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November 29, 2007

VIA ELECTRONIC FILING

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
395 E Street, S W.
Washington, D C 20423-0001

Re: J P. Rail, Inc -Lease Operation Exemption-
NAT Industries, Inc
STB Finance Docket No. 35090

Dear Secretary Williams.

Enclosed for electronic filing is the New Jersey Department of Environmental Protection Petition to Revoke Exemption or in the Alternative to Stay Effectiveness of Exemption

Respectfully submitted,

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Kevin P. Auerbacher
Deputy Attorney General

JCM/bjz
Encl

c Service List for STB Finance Docket No. 35090 **(via electronic mail)**

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO 35090

JP RAIL, INC
LEASE AND OPERATION EXEMPTION –
NAT INDUSTRIES, INC.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION PETITION
TO REVOKE EXEMPTION
OR IN THE ALTERNATIVE TO STAY
EFFECTIVENESS OF EXEMPTION

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Attorney for the New Jersey Department
of Environmental Protection

Pursuant to 49 C F R § 1150 45 and the October 25, 2007 decision of the Surface Transportation Board ("Board"), the New Jersey Department of Environmental Protection ("NJDEP"), as the state agency charged with enforcing laws concerning air pollution, water pollution, conservation, environmental protection, and waste and refuse disposal, N J S A 13 1D-9n, respectfully petitions the Board to revoke the exemption scheduled to become effective on December

6, 2007, or in the alternative to stay the exemption NJDEP is concerned that J P Rail, Inc ("JP Rail") is misusing the Notice of Exemption to further the operation of a rail-side solid waste facility located in Pleasantville, New Jersey (the "Pleasantville Facility") The Pleasantville facility has been the subject of litigation by the NJDEP, and is currently the subject of an appeal in the Appellate Division of the Superior Court of New Jersey

FACTUAL BACKGROUND

In the Notice of Exemption filed by JP Rail, JP Rail identifies the Pleasantville Facility as the source of traffic to be served at the proposed facility in Pennsylvania The following is a brief description of the history of and the involvement of JP Rail and Magic Disposal, Inc ("Magic Disposal") a waste hauler with a troubled environmental history (Exhibits B and C), with the Pleasantville Facility

JP Rail and Magic Disposal were defendants in an action brought by NJDEP in the Superior Court of New Jersey, Atlantic County, Docket No ATL-C-41-06, seeking to enjoin the construction and operation of the Pleasantville Facility until it complied with State solid waste and coastal zone management law Defendants had already failed to convince a federal district court that its prior attempt to construct a solid waste facility in Mullica Township in the Pinelands would be "transportation by rail carrier" under the Interstate Commerce Commission Termination Act, 49 U S C § 10101 et seq ("ICCTA") See J P Rail, Inc v New Jersey Pinelands Comm'n, 404 F Supp 2d 636 (D N J 2005) David DeClement, a New Jersey attorney who is now an officer at JP Rail, represented Magic Disposal, the purported shipper at the Mullica site as well as the Pleasantville Facility, in that litigation

Shortly after Defendants' attempt was enjoined by the federal district court, Defendants chose

Pleasantville as their new location, and again claimed – as they did in the federal action - that the Pleasantville Facility was not subject to any State or local regulation because such regulation was preempted under ICCTA. The operations at the Pleasantville Facility were the same as at any other waste transfer facility and raised the same environmental, health and safety concerns, including dust emissions and contaminated storm water run-off and wastewater leaching into the ground water and reaching surface waters, as any solid waste facility. Truckloads of construction and demolition waste ("C&D") were first dumped onto a concrete platform, or "tipping floor," located in an unenclosed building. Heavy equipment was then used to process the material, including removing items of value, such as wood, metal and cardboard, from the C&D pile. These materials were retained for resale by Magic Disposal. The remaining C&D was loaded onto railroad cars for shipment to landfills in Ohio. (See Exh. A, page 34)

NJDEP filed its complaint concerning the Pleasantville Facility against JP Rail and Magic Disposal on May 8, 2006. After a hearing, on June 22, 2006, the Court preliminary enjoined Defendants from processing solid waste at the Pleasantville Facility. JP Rail filed an application for leave to file an interlocutory appeal, which was denied on August 4, 2006. Following discovery, a trial was held in July, 2007. On August 14, 2007, the Court issued an opinion and judgment in which the Court ruled that state regulation of the Pleasantville Facility was not preempted by ICCTA. (See Exh. A). The Court did, however, permit the Pleasantville Facility to reopen subject to regulation under the State's 2D Regulations, N.J.A.C. 7:26-2D.1.[1] NJDEP appealed, among other things, the Court's finding that the Pleasantville Facility is transportation by rail carrier under ICCTA. A recently issued briefing schedule calls for briefing in the first months of 2008.

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[1] The Pleasantville Facility currently appears to be in violation of the 2D Regulations. For example, N.J.A.C. 7:26-2D.1(d)(1) requires that the processing of materials take place in a building which meets the Uniform Construction

ARGUMENT

THE NOTICE OF EXEMPTION PROCEDURE IS NOT APPROPRIATE HERE

JP Rail seeks to acquire quick, unexamined approval of the Board without undergoing full regulatory scrutiny, including any review of the effects of the proposal on the environment and local community In fact, in its Notice of Exemption, JP Rail states that it is not subject to environmental review NJDEP asserts that the granting of JP Rail's application would have significant effects, not only on the subject site, but also to the Pleasantville area because of the interrelationship between this proposed facility and the Pleasantville Facility

Of first and primary interest is JP Rail's failure to identify Magic Disposal in the Notice of Exemption, even though Magic Disposal is the sole "shipper" from the Pleasantville Facility, financed and built the Pleasantville Facility, and uses its employees and equipment to process and load the C&D waste at the Pleasantville Facility (Exhibit A, page 35) Instead, the customers to be served are identified as "those originating traffic" from the Pleasantville Facility, "including Salem Logistics, LLC, a subsidiary company" of JP Rail The only subsidiary company of which NJDEP is aware, however, is SRNJ Logistics, LLC ("SRNJ Logistics"), which Certificate of Formation was filed on January 26, 2006 SRNJ Logistics employs one full-time administrator and a part-time secretary, neither of whom originates traffic other than C&D brought to the Pleasantville Facility by Magic Disposal Magic Disposal embarked on this path after its independent ability to operate its own solid waste transfer facility in Egg Harbor Township, New Jersey, a truck to truck transfer operation, was terminated for its continuous refusal to comply with environmental laws See Exh , p 29, Order filed June 7, 2005, County of Atlantic v Magic Disposal, Inc , Docket No ATL-C84-

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Code The Pleasantville Facility does not (See Exh D)

01E, Superior Court of New Jersey, Chancery Division, Atlantic County Additionally Magic Disposal's permit to operate the trucks used to pick up C&D at construction sites is subject to a current revocation proceeding (See Exh C)

A person must obtain proper authorization from the Board in order to operate a rail line Approval is only proper after the Board weighs the public interest 49 U S C § 10901, Jefferson Terminal Railroad Co-Acq And Oper Exemption-Crown Enterprises, Inc , STB FD NO 33950, Slip Op at 4 (served March 19, 2001) ("Jefferson Terminal") Under 49 C F R § 1150 31, exemption from this full review may be appropriate through a Notice of Exemption proceeding allowing "after the fact" Board review (if objections are received) See Riverview Trenton Railroad Company-Acq And Oper Exemption-Crown Enterprises, Inc , STB FD No 33980, Slip Op at 7 (served February 15, 2002) ("Riverview Trenton") This exemption procedure is generally intended for transactions that are "so routine" and in order to facilitate the continuity of rail service Jefferson Terminal, Slip Op at 4 The class exemption procedures are thus "designed to meet the need for expeditious handling of a large number of requests that are rarely opposed" Riverview Trenton, Slip Op at 6 However, full review by the Board, rather than a Notice of Exemption proceeding, is appropriate with matters that "attract substantial controversy and opposition, including opposition from public agencies" and where the transaction is to convert private carrier operations into common carrier service Riverview Trenton, Slip Op at 6-10, Jefferson Terminal Slip Op at 4-5 Both of those considerations are present here

The Notice of Exemption procedure is further inappropriate given the significant questions raised by the application as well as the Verified Statement of David M DeClement ("DeClement Statement") In its Decision of October 25, 2007, the Board directed JP Rail to provide information

describing in more detail its anticipated operations, and supporting its claim that environmental review is not warranted here " The DeClement Statement, which was the only information provided in response to the Board's directive, fails to provide such information Indeed, the DeClement Statement raises several questions that highlight the need for further environmental review by the Board in this matter

For example, Paragraph 9 of the DeClement Statement says that JP Rail's operation will increase the average number of carloads received at the Carroll Township property by 500 on an annual basis It does not provide the current number of carloads received to determine whether the increase is sufficient to trigger the requirement for environmental documentation pursuant to 49 C F R § 1105 6 (a)(4)(i) (referencing §1105 7(e)4 and 5) Similarly, Paragraph 12 states that there will be an increase of the number of outbound truckloads departing the Carroll Township property to the landfill by six (6) trucks per day Again, no information is provided as to current traffic to determine whether § 1105 7(5)(i) is implicated

The DeClement Statement also is misleading in that it states that it plans to serve "customers" originating traffic at the Pleasantville Facility NJDEP is aware of only one "customer" at the Pleasantville Facility, and that is Magic Disposal, which NJDEP maintains is more than simply a "customer " Magic Disposal's operation of the Pleasantville Facility, including processing the C&D that its own trucks bring to that facility, makes it unlikely that any other "customers" will utilize that facility As further support, it should be noted that the DeClement Statement fails to identify any local customers, nor does it describe what services it will provide to them

In sum, in spite of the Board's specific directive to do so, JP Rail does not make any attempt to comply with the Board's order requiring it to "explain[] why its operations would not exceed the

environmental thresholds or otherwise warrant the preparation of environmental documentation"

Instead, it seems clear that the Notice of Exemption procedure and preemption under ICCTA, 49 U.S.C. § 10501(b), is being abused in order to facilitate the JP Rail and/or Magic Disposal scheme to facilitate the handling and processing of solid waste at least in New Jersey, if not also in Pennsylvania, in defiance of essential state health and safety regulation. In view of the history of JP Rail and Magic Disposal, JP Rail should be required to show that it does in fact intend only to operate as a legitimate rail carrier and that it will be serving the general public, not just its affiliate, Magic Disposal. The exemption process is not an appropriate method for going forward on this important matter. As a result, the exemption that was scheduled to become effective on December 6, 2007, should be revoked, or in the alternative, the exemption should be stayed so that the Board can fully explore the propriety of the Notice of Exemption procedure here.

CONCLUSION

Based on the foregoing, NJDEP believes that JP Rail's Notice of Exemption contains false and/or misleading information and raises issues that cannot be determined through the exemption process, such that the exemption should be revoked or alternatively, stayed. In the event JP Rail wishes to proceed, its application should be subject to full scrutiny by the Board.

Respectfully submitted,

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By _____
Kevin P. Auerbacher
Deputy Attorney General

DATED: November 29, 2007

CERTIFICATE OF SERVICE

I certify that I have this day, November 29, 2007, served copies of the Petition to Revoke Exemption or in the Alternative to Stay Effectiveness of Exemption in this proceeding (FD No 35090) by the New Jersey Department of Environmental Protection upon John D Heffner, Esq , attorney for applicant, J P Rail, Inc , via electronic mail at jheffner@verizon net, Stephen M Richmond, attorney for Pennsylvania Waste Industries Association via electronic mail at srichmond@bdlaw com, and James A Meade, attorney for the Pennsylvania Department of Environmental Protection, via electronic mail at jmeade@state pa us

Michele D McGahey

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO 35090

JP RAIL, INC
– LEASE AND OPERATION EXEMPTION
NAT INDUSTRIES, INC

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION PETITION
TO REVOKE EXEMPTION
OR IN THE ALTERNATIVE TO STAY
EFFECTIVENESS OF EXEMPTION

Exhibit A

SUPERIOR COURT OF NEW JERSEY

COUNTIES OF
ATLANTIC AND CAPE MAY

WILLIAM C. TODD, III
Presiding Judge
Chancery - General Equity Division

1201 Bacharach Boulevard
Atlantic City, NJ 08401-4527
609'345-6700

August 14, 2007

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Re: Docket No. ATL-C-41-06
NJ DEP v. JP Rail

Dear Counsel.

I am enclosing with this letter copies of my opinion and the judgment which has now been entered I trust those materials are self explanatory

This should conclude the litigation that has been pending before me I will appreciate being advised immediately if any of you feel there are any additional issues I need to address If that is the case, I will be glad to consider scheduling an additional conference As an aside, I would appreciate receiving a copy of the anticipated decision from the Third Circuit whenever that is available to you

Truly,

William C Todd III P J Ch

STATE OF NEW JERSEY, DEPAT. OF ENVI L. PROT., Plaintiff,	:	**SUPERIOR COURT OF NEW JERSEY ATLANTIC COUNTY CHANCERY DIVISION**
v.	:	
	:	**DOCKET NO. ATL-C-41-06**
J.P. RAIL, INC., D/B/A S.R.R. CO. OF NEW JERSEY, SRNJ *LOGISTICS, AND MAGIC* DISPOSAL, Defendants.	:	**JUDGMENT**

This matter coming before the court for trial July 23, 24 and 25, 2007, DAG Jon C. Martin, Esq appearing for plaintiff, John K Fiorilla, Esq, appearing for defendants J P Rail, Inc , and SRNJ Logistics, and Frank G Olivo Esq appearing for defendant Magic, and the court having considered the proofs presented and the arguments of counsel and the court having issued a written opinion addressing the issues presented,

It is this 14th day of August 2007 ordered and adjudged as follows

1 The provisions of the court's prior orders of June 22, 2006 and November 3, 2006 prohibiting the defendants from processing solid waste at the Facility located at 16 N Franklin Boulevard, Pleasantville, N J. are hereby vacated

2 Defendant J P Rail Inc is permitted to reopen the Facility noted above without prior approval from plaintiff

3 To the extent defendant J P Rail Inc elects to involve defendant Magic in the transloading of materials at the Facility noted above, that is to be done pursuant to a written agreement clearly defining Magic's role and the financial arrangements between Magic, J P Rail and SRNJ Logistics with respect to the operations at the Facility. Plaintiff is to be provided with a copy of any such agreement as soon as the agreement is executed. Modifications of any such agreement are also to be provided on an ongoing basis.

4 The operation of the Facility shall be subject to regulation by plaintiff pursuant to the 2D Regulations, pursuant to N.J S A 13 1E-9

5 No costs are awarded to any party

William C. Todd, III, P.J.Ch.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

STATE OF NEW JERSEY, DEPT. OF ENVTL. PROT.,	**SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION**
PLAINTIFF,	**CIVIL ACTION**
V.	**DOCKET NO. ATL-C-41-06**
J.P. RAIL, INC., D/B/A S.R.R. CO. OF NEW JERSEY, SRNJ LOGISTICS AND MAGIC DISPOSAL INC.	**OPINION**
DEFENDANTS	

Decided August 14, 2007

Appearances
Ian C Martin, D A G , for plaintiff, the State of New Jersey, Dept of Environmental Protection
John K Fiorilla, Esq , for defendants, J P Rail, Inc , d/b/a Southern Railroad Co of New Jersey, and SRNJ Logistics (Capehardt & Scatchard, attorneys)
Frank G Olivo, Esq , Attorney for Magic Disposal, Inc

William C. Todd, P J Ch

The processing of solid waste is an activity typically regulated by the states Railroads are generally regulated by the federal government, which has preempted state regulation of rail carriers Railroads have now become involved in transporting solid waste In some circumstances, that will require the processing of the materials in question before those materials are placed on a railcar for transportation That processing may occur at a facility owned controlled or operated by a railroad It may also involve individuals or entities other than a railroad The primary issue presented in this case is whether and how the federal statute providing for preemption bars or limits state

regulation of the processing waste in such circumstances That issue has been considered in a variety of forums This opinion is intended to outline this court's conclusions as to the proposed regulation of one such facility located in Pleasantville, N J In resolving the matter, it is necessary to address just how that facility was operated and the extent of federal preemption Those matters were addressed in a number of preliminary proceedings, and at a trial conducted in July 2007 For the reasons noted below, this court has concluded that the railroad does have the right to resume transloading operations at the facility in question, subject to the plaintiff's right to regulate that facility pursuant to certain regulations which are a part of the New Jersey Administrative Code

General Background and Procedural History

The complaint in this matter was filed by the New Jersey Department of Environmental Protection (hereinafter, "NJDEP") in May 2006 NJDEP asserted claims against three separate entities that were involved in some capacity in the construction and operation of the facility at issue (hereinafter, "the Facility") NJDEP's complaint sought the issuance of a permanent injunction prohibiting the construction and operation of the facility, based on a number of different state regulatory programs At issue was the proposed and actual use of the property as a transloading facility, involving the processing of solid waste as it was being transferred from trucks to railroad cars Defendant J P Rail, Inc (hereinafter "J P Rail") is the owner of the property in question which has been serviced by rail lines for a substantial period of time It is also the rail carrier which would ultimately receive and then transport the materials in question from the Facility Defendant Magic Disposal (hereinafter "Magic") is an entity that has been involved in the processing of solid waste in the Atlantic County area for years, which had

previously been involved in the development and operation of solid waste transfer stations which were subject to the regulation of NJDEP Magic did in fact bring solid waste to the Facility once it was operational As will be noted below, it was also involved in the construction on this property and in the transloading that occurred there Defendant SRNJ Logistics (hereinafter "Logistics") is an entity with only one or two employees which handles administrative matters related to the rail operation for the railroad It was involved in those activities before the parties became involved in the Facility, and was involved in administrative matters related to the operation of the Facility David DeClement is an individual who has been involved in the affairs of all the defendants He is not a party, but does have an ownership interest in both J P Rail and Logistics Mr DeClement is an attorney In the past he has represented Magic and/or Mr Waszen, a principal in Magic, in a variety of matters He also holds the position of Director of Freight Operations for J P Rail

NJDEP contends that the facility in question is subject to regulation pursuant to the Solid Waste Management Act (hereinafter "SWMA"), N J S A 13 1E-1 to -202, the Coastal Zone Management Act, 33 U S C §§ 1451-1466, and the Coastal Area Facility Review Act (hereinafter "CAFRA"), N J S A 13 19-1 to -33 Also at issue are regulations enacted pursuant to the Solid Waste Management Act, commonly referred to as the 2D Regulations See N J A C 7 26-2D 1 In essence, NJDEP has asked the court to prohibit the operation of the Facility based on the defendants' failure to comply with those regulatory schemes, including the permitting requirements of SWMA, specifically applicable to solid waste transfer stations Defendants, on the other hand, contend that those state regulatory schemes have been preempted by the federal government through

the Interstate Commerce Commission Termination Act (hereinafter "ICCTA"), 49 U S C §§ 10101-11908, which places exclusive jurisdiction over rail transportation with the Surface Transportation Board (hereinafter "STB") Alternatively, defendants contend they have complied with whatever state regulation is permitted Defendants' counterclaim requests a determination that J P Rail has complied with the 2D regulations enacted pursuant to SWMA

The complaint in this matter was filed May 8, 2006 The complaint contained three counts The first count asserted a right to relief under CAFRA, requesting the issuance of an injunction against the construction and operation of the facility in question based on the failure to obtain an appropriate permit under that statute, and failure to comply with SWMA and the 2D regulations The second count asserted a right to the same type of injunctive relief under SWMA, referring to the statutory obligation to register and obtain approval from NJDEP before operating a solid waste facility The third count alleged violations of the 2D regulations, and sought the issuance of an injunction against continued construction and operation on that basis J P Rail and Logistics filed a joint answer and counterclaim February 1, 2007 That counterclaim asserted that defendant J P Rail had complied with the 2D regulations, and that the actions that had been taken by NJDEP constituted selective enforcement of the regulations and SWMA, entitling defendants to injunctive relief Magic did eventually submit a separate answer but did not assert any affirmative claims.

NJDEP's application for a preliminary injunction was considered June 16, 2006 In an oral decision issued that day, this court concluded that ICCTA's preemption provisions did not preempt state regulation of the processing of solid waste, and did issue

an order enjoining the defendants from the processing of solid waste at the Facility The order in question, issued June 22, 2006 prohibited all defendants from the processing of solid waste at the Pleasantville facility, referring specifically to disposal, sorting, processing, grinding, crushing, aggregating, segregating or baling solid waste prior to loading into rail cars or containers for rail shipment J P Rail and SRNJ did file a motion for leave to appeal from the court's June 16, 2006 order That motion was denied by the Appellate Division August 4 2006 In November 2006, in response to a motion for enforcement of litigant's rights, this court modified the prior restraint to prohibit defendants from bringing any solid waste to the facility except in sealed containers which would be placed directly on the railway without processing Some discovery was conducted Motions for summary judgment were then considered in April 2007 As a result of those motions defendant's claims of selective enforcement were limited In all other respects, the motions for summary judgment were denied The matter proceeded to trial in July 2007 The preliminary injunction issued in June 2006, as modified in November, has remained in effect to date

Federal preemption, as it may apply to the processing of solid waste, has been the subject of a number of proceedings both in the courts and before the STB Prior decisions dealing with that issue will be reviewed below The court will then address the factual disputes presented in this matter, its own legal analysis and its conclusion That analysis will focus on the state's ability to regulate the processing of solid waste under SWMA Additional comments will be made with respect to the potential for regulation under CAFRA

Federal Preemption – Potential Fact Issues

The most fundamental question presented in this matter is whether the preemption provisions of ICCTA bar state regulation of the processing of solid waste when the process involves the delivery of solid waste to a rail carrier Preemption is generally an issue of congressional intent, and often involves issues of statutory interpretation The case law suggests a number of general principles that apply to any analysis of whether there has been preemption, in any given area

Our courts have recognized three types of preemption—(1) express preemption, arising out of a specific statutory command that state law be displaced, (2) field preemption, which arises when federal law so thoroughly occupies a legislative field, supporting the inference Congress left no room for the States to supplement its action, and (3) conflict preemption which arises when a state law makes it impossible to comply with both state and federal law, or when the state law stands as an obstacle to the accomplishment of Congress' objectives See St Thomas-St John Hotel and Tourism Assoc v Virgin Islands, 218 F 3d 232, 237-8 (3d Cir 2000) It has also been recognized that any preemption analysis should be "tempered by the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted " Merrill Lynch v Ware, 414 U S 117, 127, 38 L Ed 2d 348, 359, 94 S Ct 383, 389-90 (1973) In a case dealing with the regulation of railroads and the federal statute at issue here, the New Jersey Supreme Court noted a similar concern in the following passage

> Consistent with the nature of federalism "[w]e begin by noting that preemption is not to be lightly presumed and that the historic police powers of the States are not to be superseded by federal law unless that was the clear and manifest purpose of Congress "

Ridgefield Park v NY, Susquehanna & W Ry, 163 N J 446, 453 (2000)

(quoting Franklin Tower One v N M, 157 N J 602, 615, 725 A 2d 1104 (1999))

ICCTA was enacted in 1996 That statute created the Surface Transportation Board It clearly contemplated that some state regulation would be preempted ICCTA deals with the issue of preemption as follows

> The jurisdiction of the [STB] over –
>
> (1) *transportation by rail carriers*, and the remedies provided in this part [49 U S C § 10101 et seq] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, *and facilities of such carriers*, and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.
>
> *is exclusive* Except as otherwise provided in this part, *the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law*

49 U S C § 10501(b) (emphasis supplied)

ICCTA also defines "transportation" in broad terms, as follows

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use, and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property

49 U S C § 10102(9)

There has been a substantial amount of litigation dealing with the issue of preemption under ICCTA The issue can arise in a variety of contexts, involving

different types of properties, different activities and different state regulatory schemes Ridgefield Park, for example, involved an attempt to regulate a maintenance facility constructed within the municipality in question, where issues were raised as to the potential preemption of basic health, safety, zoning and land use laws

Many of the reported cases deal with the process of transloading, or moving materials to or from railcars The cases dealing with transloading can also involve a variety of different circumstances It may be of some moment whether the activity that might be subject to state regulation involves the placement of materials on a railcar, or the movement of materials from a railcar to some other location. The materials at issue may be different The type of proposed regulation may also vary Green Mountain R R Corp v Vt , 404 F 3d 638 (2d Cir 2005), for example, dealt with the application of Vermont's environmental land use statute to a proposed transloading facility which would unload bulk salt, bulk cement, and non bulk goods such as steel pipe In that case, the Second Circuit did find that the proposed environmental regulation, through permitting, was preempted

A number of courts have suggested specific factual inquiries are necessary to address preemption claims involving the transloading process, particularly when the matter involves the processing of solid waste That inquiry generally focuses on the specific language of 49 U S C § 10501(b) and the question of whether the activity at issue involves "transportation by rail" or "transportation to rail " That inquiry, in turn, may require an analysis of just what entities are involved in the activity at issue, and how they are involved That analysis has been adopted by a number of courts

That type of analysis was adopted by the Third Circuit in Hi Tech Trans , LLC v N J , 382 F 3d 295 (3d Cir 2004), a case that involved the transloading of solid waste That case involved a solid waste disposal facility in Newark, N J The Canadian Pacific Railroad (CPR) owned trackage rights into the Oak Island Rail Yard (OIRY) The railroad and Hi Tech entered into a License Agreement under which Hi Tech agreed to develop and operate a construction and demolition debris bulk waste loading facility at OIRY The License Agreement indicated that Hi Tech could only use the premises in question to transfer waste products from trucks to railcars operated by CPR Hi Tech filed suit against the NJDEP, the plaintiff in this action, seeking a determination that its attempt to regulate the facility in question under the SWMA was preempted and therefore subject to the exclusive jurisdiction of the Surface Transportation Board under ICCTA After an extensive factual and legal analysis, the Third Circuit affirmed the District Court's action, concluding that the proposed regulation under SWMA was not preempted by ICCTA As part of its analysis, the Third Circuit adopted the distinction between "transportation by rail" and "transportation to rail " The following passage appears in its opinion

> Even if we assume arguendo that Hi Tech's facility falls within the statutory definition of "transportation" and/or "railroad," the facility still satisfies only a part of the equation The STB has exclusive jurisdiction over 'transportation by rail carrier " 49 U S C § 10501(a), (b) (emphasis added) However, the most cursory analysis of Hi Tech's operations reveals that its facility does not involve transportation by rail carrier " The most it involves is transportation "to rail carrier " Trucks bring C&D debris from construction sites to Hi Tech's facility where the debris is dumped into Hi Tech's hoppers Hi Tech then "transloads " the C&D debris from its hoppers into rail cars owned and operated by CPR, the railroad It is CPR that then transports the C&D debris "by rail" to out of state disposal facilities As we noted above, Hi Tech operates its facility under a License Agreement with CPR Pursuant to the terms of that

> license agreement, Hi Tech is permitted to use a portion of CPR's ORY for transloading Hi Tech is responsible for constructing and maintaining the facility and CPR disclaims any liability for Hi Tech's operations License Agreement, PP 4(d), 7 Thus, the License Agreement essentially eliminates CPR's involvement in, and responsibility for, the operation of Hi Tech's facility Hi Tech does not claim that there is any agency or employment relationship between it and CPR or that CPR sets or charges a fee to those who bring C&D debris to Hi Tech's transloading facility
>
> Accordingly, it is clear that Hi Tech simply uses CPR's property to load C&D debris into/onto CPR's railcars The mere fact that the CPR ultimately uses rail cars to transport the C&D debris Hi Tech loads does not morph Hi Tech's activities into "transportation by rail carrier " Indeed, if Hi Tech's reasoning is accepted, any nonrail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a railcarrier The district court could not accept the argument that Congress intended the exclusive jurisdiction of the STB to sweep that broadly, and neither can we

Hi Tech, 382 F 3d at 308-209 (footnote omitted)

Approximately one year later, Judge Simandle applied a similar analysis in his opinion in J P Rail, Inc v N J Pinelands Comm'n, 404 F Supp 2d 636 (D N J 2005) That case arose out of an effort by J P Rail and Magic, two of the defendants in this matter, to locate a waste transfer station at a property in Mullica Township, N J [1] Steven Waszen, Sr , a principal in Magic, had acquired the property in Mullica Township While the property was not served by a rail line, it was apparently contemplated that a rail spur could be constructed, which would connect the property to a rail line That process would have required approvals from New Jersey Transit In any event, the property was then transferred to Mr Waszen's son, who then entered into a ground lease with J P. Rail Mr Waszen Jr , as Landlord, agreed to construct facilities at the property, apparently for the processing of solid waste Eventually, J P Rail notified Mullica Township of its

[1] Ultimately defendants abandoned that effort That in turn led to the construction of the facility at issue in this manner

intention to construct a waste disposal facility at the site, proposing that it would use that facility to transload containers of solid waste to rail cars bound for destinations in interstate commerce During the same period of time, Elwood Transload, Inc and Elwood Brokerage, Inc were incorporated, for the purpose of operating the proposed facility The Waszen's apparently controlled each of those entities Both Elwood Transload, Inc and Elwood Brokerage, Inc entered into agreements with J P Rail dealing with the proposed operation of the facility in question Sometime later, control of the Elwood entities was transferred to Mr DeClement, who had previously represented either Magic or the Waszen's

The Mullica Township property was located in the Pinelands National Preserve, and was generally subject to regulation by the Pinelands Commission See N J S A 13 18A-1 to -58 J P Rail filed suit in federal district court against the Pinelands Commission requesting an injunction pursuant to ICCTA which would bar the Pinelands Commission from preventing or interfering with the construction proposed at that property The Pinelands Commission filed a third party complaint against Magic, the Waszens and the Elwood entities, asserting a right to regulate the facility in question Judge Simandle addressed the matter on cross-applications for preliminary injunctive relief J P Rail's request for a preliminary injunction was denied The Pinelands Commission's request for a preliminary injunction was granted In resolving those applications Judge Simandle relied on the prior analysis in Hi Tech Trans , LLC, focusing on the question of just what functions were to be performed at the proposed facility by the various entities involved His analysis is outlined in the following passages

> The facts here are similar to those in Hi Tech In that case the loader was permitted to use a portion of the railroad's property for transloading, here, the loader is using land leased by the railroad to conduct the proposed waste transfer activities In Hi Tech, the facility operator financed the construction and maintenance of the facility, here the Elwood Entities appear to be almost exclusively responsible for funding the facility's development and operational costs, including all state Class II railroad taxes, engineering fees, (Martin Decl Ex 17, Collard Dep Tr 127 18-24,) and the $ 257,225 deposit to New Jersey Transit (Id at 177) Finally, in Hi Tech the licensing agreement between Hi Tech and the railroad disclaimed any liability by the railroad for Hi Tech's operations, here, the agreements between SRNJ and the Elwood Entities essentially eliminate the railroad's liability for damage caused by the operation of the facility In short, Third-Party Defendants will "simply use[] [the railroad's] property to load debris into/onto [the railroad's] railcars The mere fact that the [railroad] ultimately uses rail cars to transport the debris [Third-Party Defendants] load[] does not morph [Third-Party Defendants] activities into 'transportation by rail carrier '" Hi Tech, 382 F 3d at 309
>
> SRNJ argues that the proposed facility here is more akin to the one at issue in Canadian Nat'l Railway Co v City of Rockwood, 2005 U S Dist LEXIS 40131, Docket No 04-40323 (F D Mich , June 1, 2005) (Pl Ex C) There, Canadian National Railroad had contracted with a third-party to perform the actual operation of the equipment at its transloading facility The court held that despite the agreement with a third-party contractor, Canadian National was the party providing the transloading services and, thus, that the activities occurring at the transload facility were subject exclusively to the STB's jurisdiction See also 36 N J Reg 5105 (Nov 15, 2004) (recognizing regulation of transload and transfer operations federally preempted even though conducted by third parties "as long as those activities [are] being conducted on behalf of the rail carrier as part of its rail transportation services") Here, however, for the reasons just explained, Elwood's activities are not being conducted on behalf of SRNJ Canadian Nat'l is, thus, distinguishable from this case and, in any event, Hi Tech, being a decision of the Third Circuit, is binding precedent upon this Court

J P Rail, Inc , 404 F Supp 2d at 650-651 (footnotes omitted)

On that basis, Judge Simandle concluded that the activities at issue in that matter were "transportation to rail" rather than "transportation by rail" and that the plaintiff had not established a probability of success which would justify the issuance of a preliminary injunction prohibiting regulation by the Pinelands Commission based on preemption

under ICCTA As already noted, it is this court's understanding that J P Rail ultimately abandoned its efforts to open a transloading facility at the Mullica Township property

Approximately one year later, in February 2007, these issues were addressed again in Judge Hayden's opinion in N Y , Susquehanna and W Ry Corp v Jackson, 2007 U S Dist LEXIS 11907 (D N J 2007) That case involved ongoing activities at five different sites in the Township of North Bergen, N J where construction and demolition waste and contaminated soil was loaded onto rail cars for shipment out of state The railroad (hereinafter "NYS&W") had declined to comply with NJDEP's 2D regulations, after their enactment in 2004, claiming those regulations were preempted NJDEP assessed a multimillion dollar fine against NYS&W NYS&W brought suit against Ms Jackson, as the Commissioner of NJDEP, challenging the 2D Regulations on the grounds of federal preemption under ICCTA, the Commerce Clause and the federal Hazardous Materials Transportation Act, 48 U S C § 5125(a) The matter was addressed in a detailed written opinion This court has been advised that decision is the subject of an appeal now pending before the Third Circuit

NYS&W owned four of the five facilities at issue, and leased the fifth Apparently all the processing of waste at those facilities was done by others, and not by the railroad NYS&W's customers were known as shippers The various shippers involved would have their own customers, who had a need to dispose of solid waste The shippers' customers would have the right to dump the waste at the facility The shipper then takes title to the waste and is able to dispose of it pursuant to its contract with the railroad In addition, NYS&W had contracts with loading agents which would be responsible for processing the waste in question The shipper pays a loading fee to NYS&W which in

turn pays the loading agent NYS&W does not profit from the transaction with the loading agent Income is derived from the fees charged to shippers to transport the materials in question on its rail line At most of the facilities the processing of waste involves it being dumped and sorted, with some materials being extracted At one facility, materials were dumped directly into a rail car from a truck, with no sorting, extraction or inspection

Judge Hayden ultimately concluded that the 2D regulations were preempted by ICCTA and enjoined the NJDEP from implementing or enforcing those regulations at the five facilities at issue In reaching that decision she concluded that NYS&W was a rail carrier, and that the North Bergen facilities or the activities at those facilities constituted "transportation " She also concluded that the activities at issue constituted "transportation by rail" rather than "transportation to rail," distinguishing the circumstances presented in North Bergen from the circumstances at issue in the Third Circuits opinion in Hi Tech Trans , LLC and from the circumstances at issue in Judge Simandle's opinion in J P Rail, Inc She addressed those cases in the following passage

> In Hi Tech, the Third Circuit held that a nonrail carrier's operation of a transload facility on a rail carrier's property involves, at most, "transportation to rail carrier," and does not qualify as "transportation by rail carrier" pursuant to ICCTA 382 F 3d at 308 The facts behind that holding are that (1) Hi Tech, a nonrail carrier, was responsible for constructing and maintaining the facility, (2) the rail carrier disclaimed all liability for Hi Tech's operation of the facility, (3) Hi Tech did not claim that there was any agency or employment relationship between it and the rail carrier, and (4) Hi Tech, not the rail carrier, set and charged a fee to those who brought C&D debris to the transloading facility Id at 308
>
> In J P Rail, Judge Simandle had similar facts, and relied on the same factors applied by the Third Circuit in Hi Tech in finding that the proposed waste transfer facility did not involve "transportation by rail carrier " 404 F Supp 2d at 638

> The State claims that the decisions in Hi Tech and J P Rail compel the Court to conclude that the five facilities at issue in this litigation also involve "transportation to rail carrier" as opposed to "transportation by rail carrier" The Court disagrees "Whether a particular activity constitutes transportation by rail carrier under [ICCTA] is a case-by-case and fact-specific determination" Hi Tech Trans, LLC Petition for Declaratory Order, No 34192, 2003 STB LEXIS 475, 2003 WL 21952136, at *3 (STB Aug 14, 2003) Making a case-by-case and fact-specific determination quickly reveals factual distinctions First, a rail carrier was not a party to the litigation in either Hi Tech or J P Rail, whereas here, a railroad licensed by the STB is claiming the exemption from State regulation Additionally, it is hard to ignore that NYS&W is the record owner or lessor of the property the facilities are located on, has paid the costs for erecting buildings at the facilities, is paid a loading fee by the shippers at each facility, and does not disclaim liability for the loading onto its rail cars by its loading agents. Where a "rail carrier builds and owns a truck-to-rail transloading facility, and holds it out to the public as its own facility, but chooses to have it run by a contract operator," the STB would find preemption according to its discussion in Hi Tech Trans, LLC Petition for Declaratory Order, 2003 STB LEXIS 475, 2003 WL 21952136, at *4 n 13 Such is the situation here
>
> The Third Circuit and STB decisions in Hi Tech soundly reject the metamorphosis of an entity from a non-rail carrier to a rail carrier Likewise, it seems unlikely that Congress or the STB would accept an analysis that carves portions that are seamlessly part of the rail carrier's operations out of the exclusive jurisdiction of the STB Until Congress passes legislation that does just this, decisional law in this Circuit goes directly against the State's position
>
> Based on the facts established in this record, and the analysis in the relevant cases and the text of the relevant statute, the Court holds that the activity at the North Bergen facilities does constitute transportation by rail carrier

N Y , Susquehanna & Wyo R R , 2007 U S Dist LEXIS 11907, at *59-62

The opinions in Hi Tech Trans , LLC, J P Rail, Inc , and N Y , Susquehanna all suggest it is necessary to engage in a fact sensitive analysis, on a case by case basis, in resolving preemption issues in this area The precise inquiry required, however, is less than clear Presumably the ultimate question may be whether the facility or activity which

is potentially subject to regulation involves "transportation by rail" or "transportation to rail." That question, however, could suggest a number of factual issues. Does the issue turn on the specific activity at issue? Is it important whether the rail carrier in question owns the land on which the activity is to occur, or the improvements constructed on the land to permit the activity in question? Is the identity of the individual or entity that is involved in the activity dispositive, or does the matter turn on whether or not the rail carrier is somehow "in control" of the activity in question? Does the rail carrier derive some financial benefit from the processing of the materials in question, or is that processing simply incidental to transportation by rail? By definition these types of disputes will involve, in one way or another, the movement or processing of solid waste, on its way to a rail carrier. Under the cases cited, it is difficult to see any clear line that defines just when state regulation of that activity is preempted under ICCTA.

In some of the proceedings in this matter, it has been suggested that the issue of preemption may turn on whether the railroad or some other entity controls either the facility in question or the activity which might be subject to regulation. In the context of this case, that issue is framed by NJDEP's claim that the Pleasantville operation is nothing more than Magic's attempt to avoid state regulation of its activities in processing solid wastes, by involving a rail carrier. While it is simple enough to present the issue in terms of "control," it is difficult to develop any clear standards that would govern the resolution of that issue in every circumstance. The opinions in Hi Tech Trans, LLC, I P Rail, Inc., and N. Y. Susquehanna illustrate that problem.

In High Tech Trans, LLC, the rail carrier apparently owned the land in question, but had given control of the facility to High Tech which used it for transloading. While

High Tech and the rail carrier had entered into a Licensing Agreement, there was no indication of any agency or employment relationship between them, and no indication the rail carrier set or charged fees to those who would bring materials to the facility The Third Circuit was apparently satisfied there was a clear differentiation between the operation of the railroad and the processing of the waste materials in question and found state regulation of the latter was not preempted One could suggest it was clear, from all the circumstances, that the rail carrier had no control over the processing of the materials at issue in that matter In J P Rail, Inc the rail carrier did not own the land, but had entered into a long term ground lease with the owner It appeared that other entities would ultimately control the facilities to be constructed on the property and the processing of materials Judge Simandle also found the activity involved "transportation to rail" rather than "transportation by rail" and concluded there was no preemption Again, one could suggest the rail carrier had no control over the processing of the materials at issue

In N Y , Susquehanna, however, Judge Hayden found there was preemption of NJDEP's attempted regulation of five separate facilities NYS&W owned four of the five facilities As in Hi Tech Trans , LLC and in J P Rail Inc the processing of the waste materials was not done by the railroad, but by loaders While NYS&W did have contracts with the loaders, and was involved in the processing of payments to them, those payments could be traced directly to the shippers, who apparently paid separately for the processing or loading the materials, and for their shipment It is difficult to distinguish the role played by the loaders in N Y , Susquehanna from the proposed roles of the Elwood entities in J P Rail Inc , or of Hi Tech Trans, as related to the processing of the materials

in question In other words, it is not clear there are material differences in those cases as to the amount of control exercised by the rail carriers in question over the actual processing of solid wastes In distinguishing the circumstances presented in N Y , Susquehanna from those presented in Hi Tech Trans , LLC and J P Rail, Inc , Judge Hayden noted that NYS&W owned the properties in question, had paid for the construction the buildings in question, was paid a loading fee, and had not disclaimed liability of the activities of the loaders While those distinctions may well be material, they do not appear to go to the day to day control of the activities involved in the processing of solid waste

The STB addressed this same problem very recently, and has offered what appears to be a different perspective on the issue of preemption Its opinion in New England Transrail, LLC—Construction, Acquisition and Operation Exemption -- in Wilmington and Woburn Ma , 2007 STB LEXIS 391, was issued June 29, 2007, a short time before the trial of this matter. That opinion arose out of a request presented by New England Transrail (hereinafter NET) for authorization to become a rail carrier, subject to STB's jurisdiction NET had sought authority to acquire some existing track, to construct new track and to operate as a rail carrier on that track and an adjacent property owned by Olin Corporation (hereinafter OLIN) NET planned to construct a facility at the OLIN property which would process solid waste, including materials classified as municipal solid waste (MSW) and construction and demolition debris(C&D) to be loaded on rail cars for shipment out of state [2] The opinion just issued addresses the preliminary issue of

[2] MSW and C&D are different types of solid waste, and the specific definitions of those terms may differ from jurisdiction to jurisdiction Definitions applicable in New Jersey can be found at N J A C 7 26-1 4 Those definitions provide that MSW "means residential commercial and institutional solid waste generated within a community " and C&D "means waste building material and rubble resulting from construction

the extent to which NET's planned activities involving the processing of solid waste come within the scope of the STB's jurisdiction. In essence, NET asked the STB to address the preemption issue prior to the construction and operation of the facility at issue, in conjunction with its request for permission to become a rail carrier. Given the extensive interest in the preemption issue, a number of entities not directly involved in NET's proposal were permitted to participate in those proceedings. NJDEP was one of those entities.

As already noted, the courts which have dealt with this issue have often focused on the issue of just who is involved in the processing of solid waste. The STB, through its opinion in New England Transrail, LLC, appears to have approached the issue from a different perspective. That opinion focuses not on the identity of the individuals or entities involved but on the type of processing which is proposed. The STB did conclude that NET would be considered a rail carrier. It reviewed the manner in which the facility in question would be operated in some detail. It then focused on the question of whether the particular type of processing at issue was integrally related to rail transportation, distinguishing between activities which were subject to preemption and activities that were not. The STB concluded that unloading material onto the floor of the transloading facility, storing the material there temporarily, loading the material into containers and rail cars, the baling or wrapping of MSW, and the extraction of refrigerators were all a part of rail transportation and therefore preempted. It also concluded, however, that the shredding of C&D, at least as proposed by NET, was not preempted. The STB appears to have concluded that if a rail carrier were to engage in the shredding of solid waste it

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remodeling, repair, and demolition operations on houses, commercial buildings, pavements and other structures." The distinction between these two types of solid waste is not material to the analysis in this matter.

would subject itself to regulation by the state, including permitting The STB discussed that distinction in the following passage

> NET has failed to persuade us, however, that the shredding it proposes to undertake to reduce the C&D into 2-foot lengths would be integrally related to rail transportation NET asserts that the purpose of this shredding would be so that it could move the C&D on a conveyer belt for loading onto rail cars We find that difficult to believe in light of the presentation at oral argument by NBW and others As the president of NBW explained, his waste processing facility can only justify the cost and other problems associated with shredding equipment because the shredding (to 2-foot lengths) and use of a conveyer belt enables his company to separate from the C&D debris by hand any metal, wood and other valuable materials, which it then resells The metal and wood that is removed has significant value
>
> Given the fact that C&D contains material with considerable value, we find it difficult to believe that NET would do nothing to retrieve that value In response to questioning at the oral hearing as to why it would not recycle any C&D components, NEI replied that it would have no space for that, that recycling was not part of its business plan, and that NEI would already be making enough money due to its lower transportation costs In other words, it claims that it would design a facility with easy access to waste streams and then not capitalize on the opportunity to recycle metal with a value of up to $ 50,000 per ton pass by, destined for a landfill But businesses rarely forgo significant economic opportunities
>
> NET did not adequately demonstrate that the shredding activity they propose would be integrally related to rail transportation As noted at the oral argument, a shredder is not required to pack into rail cars material that has arrived at its facility packed into trucks Additionally, the record indicates that shredding is a common practice in the landfill and waste management businesses and often facilitates recycling Nor are we persuaded that the size of the facility would be so large that NET would need to use a conveyer belt just to move waste within the facility for transfer
>
> For all of these reasons, we find that NET has not met its burden of demonstrating that its proposed shredding activities at the Olin site would be part of rail transportation Therefore, those activities would not be subject to the Board's jurisdiction or covered by the section 10501(b) preemption *If NET chooses to conduct the shredding activities then it would be subject to the full panoply of state and local regulation*

New England Transrail LLC, 2007 STB LEXIS 391 at *33-36 (footnotes omitted)

Notably, the STB's decision in New England Transrail LLC was not unanimous There were three members of the STB who participated in that decision the Chairman, the Vice Chairman and one Commissioner Commissioner Mulvey issued a written dissent, specifically noting that he did not agree with the STB's determination that the unloading of MSW onto the floor and the temporary storage, baling and loading of those materials were activities which were subject to preemption He outlined his concerns in the following passage

> There is a critical reason that the power to regulate the handling of MSW has been delegated to the states—and that is because states and localities are in the best position to protect the health and safety of their citizens and to understand the impacts of handling MSW While the Board typically harmonizes its interpretation and implementation of the Act with other federal laws, there is no federal law to be harmonized here precisely because states have the authority and responsibility to regulate in the area of MSW handling
>
> I am troubled by the recent up-tick in assertions by new entrants into the MSW industry that they are rail carriers subject to the Board's jurisdiction What concerns me is these firms' attempts to blend the nature of their operations to offer both rail carrier service as well as waste processing, and to use their putative status as rail carriers to shield their waste processing operations from the reach of state and local environmental laws This tactic is manipulative and abusive of the Board's jurisdiction and powers, and it highlights a method of evading the law that I cannot support If the Board's existing interpretation of the Act cannot stop this practice, then it is time for Congress to do so

2007 STB LEXIS 391 at *46-47

As noted earlier, this court did address the preemption issue in ruling on NJDEP's request for a preliminary injunction in June 2006, concluding in general terms that ICCTA's preemption provisions did not extend to preempt state regulation of the processing of solid waste Commissioner Mulvey's analysis in the dissent in New

England Transrail LLC appears to be consistent with this court's analysis of the matter in dealing with that application for a preliminary injunction

The various decisions discussed above suggest a variety of factual determinations may be necessary to resolve the question of whether a particular facility involved in the processing of solid waste is subject to preemption under ICCTA or, alternatively, is subject to regulation by the state Issues of ownership and control may be important, as indicated in Hi Tech Trans , LLC Under the STB's decision on New England Transrail LLC it may be necessary to focus on the particular type of processing at issue

Partial Preemption—*Ridgefield Park*

It may be difficult to resolve the question of whether a particular facility is subject to preemption At the very least, the various decisions discussed above indicate the issue must be addressed on a case by case basis and is subject to very specific factual determinations There is, however, one other potential complication presented by our case law It is clear that preemption, when it applies, may not be absolute

The New Jersey Supreme Court addressed that matter in Ridgefield Park v NY, Susquehanna and W Ry , supra That case involved attempts at regulating a train maintenance facility being constructed by the railroad at a property apparently owned by the railroad and located within the Village of Ridgefield Park The railroad began construction of the facility without applying for zoning or construction permits and without otherwise informing the Village of its plans, relying on the preemption provisions of ICCTA The Village filed suit claiming the right to enjoin a nuisance, and the right regulate the facility pursuant to health safety, zoning and land use laws in a

published opinion, the Appellate Division concluded the Village was required to present its request for injunctive relief to the STB, based on the doctrine of federal preemption and primary jurisdiction and affirmed the trial court's action in dismissing the matter Ridgefield Park v N Y , Susquehanna and W Ry , 318 N J Super 385 (App Div 1999) The STB subsequently addressed the preemption issue in its decision in Borough of Riverdale Petition of Declaratory Order, N Y , Susquehanna and W Ry Corp , 1999 W L 715272 (STB September 9, 1999), concluding that zoning regulations and the use of traditional permitting programs were preempted, but that state and local governments did retain certain police powers which might be applied in a non-discriminatory way to protect public health and safety, without permitting Based on the S T B's decision in Riverdale, the New Jersey Supreme Court remanded Ridgefield Park to the trial court It provided guidance as to how efforts to regulate the facility at issue there should proceed, in language that would appear applicable in other situations

> Consistent with the STB's opinion in Riverdale, we hold that the Railroad may not deny the Village access for reasonable inspection of its maintenance facility We further hold that although the Village may not require permits of the Railroad, the Railroad must notify the Village when it is undertaking an activity for which another entity would require a permit The Village may enforce its local fire, health, plumbing, safety and construction regulations to the extent they are applicable to the existing maintenance facility Because the "maintenance facilities" consist essentially of two diesel tank cars with pumping equipment, three boxcars containing administrative offices, shops and bathroom facilities, and a hand-pumped septic system, a certain degree of pragmatism on the part of the Village will be necessary in attempting to apply its relevant ordinances and regulations to the Railroad's facilities Because of the nature of those facilities, literal compliance with all of the requirements of the Village's ordinances and regulations may be impractical, and may not be necessary to protect the public interest
>
> We envision that it will be the rare situation when fairly enforced fire, health, plumbing, safety, or construction regulations interfere with a

railroad's operations In the event that conflicts arise over the Village's attempted enforcement of those regulations, either party is free to apply to the Law Division for such relief consistent with this opinion as may be appropriate

Obviously, the nature of the Railroad's facilities does not make it feasible to subject them to the usual scope of review contemplated by municipal site plan ordinances See N J S A 40 55D-41 (authorizing site plan ordinances requiring review of location of structures, vehicle and pedestrian circulation, preservation of natural resources, parking, lighting, screening and landscaping) Nevertheless, the record informs us that in 1992 the Railroad submitted for review by the Village engineer a site plan depicting its facilities, and subsequently forwarded supplemental information requested by the engineer The Village apparently ceased, at least temporarily, its review of the Railroad's site plan Because the parties voluntarily commenced the site plan review process before the litigation commenced, we anticipate that to now require the Railroad to submit again to site plan review, tempered by the pragmatic considerations that should guide the Village's review process, will not foreclose or restrict the Railroad's ability to conduct its operations Consistent with the STB's disposition in Riverdale, 1999 STB LEXIS 531, the Village's authority to review the Railroad's site plan does not include the power to require approval of the site plan as a condition of the Railroad's continued use of its maintenance facility

Because zoning regulations imposed by the Village "clearly could be used to defeat [the Railroad's] maintenance and upgrading activities, thus interfering with the efficiency of railroad operations that are part of interstate commerce," ibid 1999 STB LEXIS 531, [WI] at *7, the Village may not dictate the location on its right-of-way of the Railroad's maintenance facility In the event the Village remains of the view that the Railroad's siting decision is arbitrary, unreasonable and contrary to the *interests of its citizens, the Village is free to seek relief on that issue from* the STB

Ridgefield Park, 163 N J at 460--462

The facility at issue in Ridgefield Park did not involve the processing of solid waste The New Jersey Supreme Court s decision in that case did not address the type of distinctions that have now been suggested both by the courts and the STB in dealing with facilities involved in that type of activity The extent to which state regulation of these

types of facilities is permissible is still subject to substantial debate The STB's decision in New England Transrail LLC indicates that engaging in a particular type of processing(i e —shredding) would expose the facility to "the full panoply of state and local regulation," presumably allowing the type of permitting which was severely limited, if not barred, under Riverdale and Ridgefield Park The dissent in New England Transrail LLC suggests a more expansive role for the state when rail roads become involved in the processing of solid waste Cases like Hi Tech Trans , LLC, J P Rail Inc and N Y , Susquehanna suggest a different type of inquiry, focusing on the issue of control It is in that context that the facts presented here must be reviewed

New Jersey's Regulatory Scheme—The 2D Regulations

New Jersey has regulated the processing of solid waste for a substantial period of time The SWMA was enacted in 1970, to address issues arising out of the collection, disposal and utilization of solid waste. See N J S A 13 1E-2 That statute authorized NJDEP to promulgate rules and regulations governing solid waste collection and disposal See N J S A 13 1F 6(a)(2) Over the years NJDEP has promulgated rules dealing with a variety of subjects, now appearing as Title 7 of the Administrative Code The rules dealing with solid waste are collected in Chapter 26 of that Title See N J A C 7 26-1 1 to -17 26

Prior to 2003, the rules promulgated by NJDEP apparently required rail carriers who operate solid waste transfer facilities to obtain a permit and approval from NJDEP before operating The New Jersey Supreme Court issued its decision in Ridgefield Park in 2000 determining that the Village in that case could not require the issuance of perm its

prior to the construction and operation of a maintenance facility, but would be permitted, in some way, to enforce it local fire, health, plumbing, safety and health regulations, recognizing such enforcement might present some practical difficulties Approximately three years later, NJDEP proposed and then enacted a number of amendments to the rules dealing with the activities of rail carriers involved in the processing of solid waste Those amendments were based on obvious concerns over preemption under ICCTA, and may have been a specific reaction to the opinion in Ridgefield Park One amendment, effective November 15, 2004, does exempt rail carriers from permitting under SWMA, subject to their obligation to comply with the 2D Regulations which were enacted at the same time That exemption from permitting appears in a part of N J A C 7 26-2 1(c)

> (c) This subsection sets forth the specific criteria for exempting rail carriers
>
> 1 This subchapter does not apply to a rail carrier that transfers containerized or noncontainerized solid waste to or from rail cars For the purpose of this subchapter, the term "rail carrier" shall mean a person as defined in 49 U S C § 10102(5) that provides common carrier railroad *transportation and has been approved pursuant to* 49 U S C §§ *10901* or 10902, by the United States Surface Transportation Board (or its predecessor agency) or otherwise has been recognized as a rail carrier by such agency, and holds out to the general public that the operations at the facility for which the exemption under this subchapter is applicable are being conducted by it or on its behalf as part of its rail transportation services However, a rail carrier that transfers containerized or noncontainerized solid waste to or from rail cars is not exempt from regulation pursuant to the Solid Waste Management Act, and shall be subject to the provisions of N J A C 7 26-2D
>
> 2 Rail carriers engaged in the business of solid waste disposal or transportation by rail, but that do not engage in the business of solid waste collection (as defined by N J S A 13 13E-3) by other means of *transportation within the State of New Jersey are exempted from the* requirement to submit a disclosure statement pursuant to N J A C 7 26-16 3

N J A C 7 26-2 1(c)

The provision cited above is a part of Subchapter 2 of Chapter 26 of Title 7 of the Administrative Code The permitting provisions of Chapter 26 are a part of Subchapter 2 See N J A C 7 26-2 3 Rail carriers transferring solid waste to and from railcars are exempted from that permitting process

The Summary issued by NJDEP with the proposed amendments suggests NJDEP may have concluded its ability to require permitting had been preempted by ICCTA See Solid Waste Transporter Registration and Related Fees for Rail Carriers, 36 N J R 5055(Proposal No PRN 2004-432, November 15, 2004) In any event, the exemption from permitting noted above and the 2D Regulations were enacted in 2004 Those regulations impose fairly specific obligations on rail carriers involved in the transportation of solid waste Separate regulations apply to rail carriers that transport waste exclusively in sealed containers and to those that engage in solid waste tipping or processing See N J A C 7 26-2D 1(c) and N J A C 7 26-2D 1(d) respectively All rail carriers are required to provide NJDEP with certain information prior to commencing operations See N J A C 7 26-2D 1(b)

This court has been asked to resolve a variety of disputes related to the potential application of the 2D Regulations to this Facility NJDEP has asserted the right to regulate the Facility under the 2D Regulations, irrespective of Magic's involvement It asserts there were a variety of violations of the 2D Regulations while the Facility was operating, justifying its action in requesting the closure of the Facility by court order, pending full and complete compliance J P Rail argues that the state's attempt to regulate this Facility pursuant to those regulations has been preempted, consistent with Judge Hayden's opinion in N Y , Susquehanna Alternatively, J P Rail has asked the

court to confirm that it has complied with the 2D Regulations Those issues will be addressed further below

Factual Determinations —Construction and Operation of the Pleasantville Facility

The factual disputes presented in this matter were somewhat limited Those disputes were addressed at trial through the testimony of eight witnesses and the submission of a variety of documents The materials submitted into evidence include surveys, plans and photographs which depict both the Facility itself and the activity that occurred at the property in question during construction and operation The following factual determinations have been made, based on the evidence presented at trial

Some circumstances relevant to this dispute occurred well before the parties became involved in the Pleasantville facility, and involve conflict between Magic, NJDEP and other governmental agencies dating back several years Magic has been involved in the processing and handling of solid waste in the Atlantic County area for years, in two distinct capacities Magic has been and is authorized to transport solid waste by truck over the highways In addition, Magic did previously operate a solid waste transfer station located on Ridge Avenue in Egg Harbor Township That facility involved truck to truck transfers, and not any rail operations The operation of that facility was subject to permitting through NJDEP pursuant to SWMA The Ridge Avenue facility was also the subject of substantial regulatory action by Atlantic County, which resulted in litigation over a number of years In June 2005, this court entered an order in a separate action that had been filed by Atlantic County several years earlier, which essentially prohibited the continued operation of that solid waste transfer station (See Exhibit P48 in evidence) In many ways this litigation reflects NJDEP's concern that Magic has

responded to the regulatory problems it encountered at the Ridge Avenue facility by attempting to establish a new solid waste transfer station in one or another location, without complying with the permitting provisions of SWMA, and only involved the railroad to avoid appropriate state regulation

The order closing the Ridge Avenue facility was entered in June 2005 Sometime prior to that, Magic became involved in the property located in Mullica Township which was ultimately the subject of Judge Simandle's opinion in J. P Rail Inc Mr Waszen had acquired that property in 2003 During 2003, Atlantic County instituted municipal court proceeding against Mr Waszen and others alleging that illegal dumping had occurred at the Mullica Township property Those proceedings resulted in the entry of a number of municipal court orders which required Mr Waszen to remove materials that he or Magic had dumped at the site and to clean up other conditions traceable to a prior owner Such orders were entered in December 2003, in June and August 2004, and in February and April 2005 (See Exhibits P46 and 47 in evidence) In the interim, a ground lease was entered into with J P Rail, apparently contemplating that the property would be used as a transloading facility, subject to federal preemption of state and local regulation under ICCTA It was in that context that J P Rail instituted the action that resulted in Judge Simandle's opinion in J P Rail Inc That opinion was issued in December 2005 J P Rail's request for a preliminary injunction prohibiting the Pinelands Commission from interfering with the property was denied J P Rail, Magic and related individuals and entities were restrained from continuing with construction at the property Ultimately, J P Rail elected not to proceed at the Mullica Township property

J P Rail has been the owner of the Pleasantville property, and has conducted rail operations, including the transloading of various types of materials which were brought to or from the property by rail for an extended period of time While it is not clear just when the defendants first considered using the Pleasantville facility for the transloading of solid waste, it does appear that occurred during the time the litigation as to the Mullica Township property was pending before Judge Simandle It is reasonable to conclude the defendants considered the Pleasantville property as an alternative to the project proposed in Mullica Township

While it is not clear just when J P Rail and Magic first considered using the Pleasantville property for the transloading of solid waste, there was some contact with municipal officials in Pleasantville about such a project by late 2005 Interestingly, one initial contact was made by Mr Waszen and one of his employees, and not by anyone employed directly by J P Rail In January 2006, J P Rail forwarded written notice to the Pleasantville City Clerk of the fact that it was "in the process of constructing and operating a new railroad transloading facility" at the property at issue here That letter indicated the Facility would only accept C&D It specifically cited the New Jersey Supreme Court's opinion in Ridgefield Park as authority for the railroad's right to proceed without applying for permits [3] That letter was eventually forwarded to NJDEP, and there was a subsequent exchange of correspondence between J P Rail's attorneys and NJDEP dealing with the Facility

A building or enclosure was constructed on the property to be used for the proposed transloading of solid waste That building was constructed by Magic's employees While it is not clear just when construction began, it is clear construction was

[3] See Exhibit P50 in evidence, Mr Fiorilla's letter of January , 2006

completed within a relatively short period of time By March 2006, solid waste was being brought to the property, processed and loaded onto rail cars for shipment By that same time, representatives from NJDEP had begun visiting the property on a regular basis A series of photographs taken by one of NJDEP's representatives from March 2006 through October 2006 were admitted in evidence [4] Those photographs do depict the building just noted and portions of the transloading operation NJDEP filed this action in May 2006, after the Facility had been operating for several months This court's preliminary injunction was issued in June 2006 and the Facility has not been used for the transloading of solid waste for a substantial period of time

A number of disputes have been presented as to the manner in which the Facility was constructed and operated At issue were the identity and/or control of the individuals involved in those processes, and the specific activities involved in the transloading of waste Preliminarily, it bears noting that both the construction of the building and the actual processing of solid waste, through the time it was placed on railcars, was done by individuals who were employees of Magic Those circumstances could support the conclusion urged by NJDEP—that the Facility was essentially a solid waste transfer station, being operated by Magic and therefore subject to state regulation Defendants' response is simple Defendants contend that while the construction and operation was actually performed by Magic's employees, that was done pursuant to agreements with J P Rail, which remained in control of the Facility Defendants argue Magic was essentially acting on behalf of the railroad, in both constructing and operating the Facility The conclusion suggested by defendants is that the Facility is nothing more than a transloading operation, being conducted by the railroad through the use of an

[4] See exhibits P -P37 in evidence

independent contractor In support of that argument, defendants have also offered proofs establishing that rail carriers regularly elect to conduct substantial portions of their operations through the use of contractors, thereby limiting the number of railroad employees That practice is apparently based, at least in part, on concerns as to the types of benefits which must be maintained for those individuals who are employed directly by a railroad There are apparently substantial savings which may be available to railroads through the use of independent contractors In that context, disputes as to just what occurred may be less important than how one characterizes the relationship between J P Rail and Magic

As noted above, J P Rail has owned this property for a substantial period of time The property itself is relatively open An existing track runs through the property The building or enclosure at issue here was constructed over that track and an adjacent open area The area where the track enters and leaves the building is open at each end, to permit railcars to be moved through the Facility The building is covered by a roof and has walls or partial walls on three sides The remaining side of the property is gated, but the gate does not extend to the full height of the building, or over the tracks An interior partition runs between the track and an open area within the building where solid waste is deposited on the floor The area above that partition is open, to permit waste to be transferred from the floor to rail cars which would be located on the other side of the partition

During the period when this Facility was operating, Magic was the only entity which brought solid waste to the Facility J P Rail has continually represented that there

are other waste haulers which would use this Facility if it is permitted to reopen on a permanent basis This court sees no reason to question that representation

This Facility was operated for three to six months, prior to the issuance of this court's preliminary injunction During that time, Magic would pick up C&D from its customers It would bring that solid waste to the facility by truck The trucks would be weighed at a scale controlled by another customer of the railroad, apparently off the railroad property After being weighed, Magic's trucks would travel to the building and deposit the waste on the open floor within the building Some materials were then removed or segregated from the materials which are on the floor, either by hand or with the use of some machines An excavator with a type of bucket was then used to lift the remaining waste from the floor, over the partition, and to deposit it in a rail car Once the rail car was loaded it would be covered by a screen, which in turn was weighed down with tires [5] The waste was then transported to its ultimate destination on that rail car Waste processed through this Facility would be transported to landfills located in other states

A number of issues are presented as to just how and why materials are segregated or extracted as a part of the process noted above and who may benefit from that process While this Facility was operating a variety of materials were extracted from the C&D before materials were loaded onto railcars The materials removed included metals, wooden pallets, cardboard, tires, full cans of paint, and some newspapers There were a number of different reasons why materials were segregated Metals were removed because their shipment might result in damage to the railcars Wooden pallets were

[5] An alternative practice is to cover the rail car with a tarp rather than a screen in which case tires are not used That alternative practice was not used at this facility

removed because the problems they would present during shipping, because of their limited weight Other materials would be removed because they would not be accepted by the landfills which would be the ultimate recipient of the remaining solid waste

At least some of the materials that were extracted could be sold to generate income for the individual or entity which received those materials, and that apparently occurred on a limited basis while the Facility was operating The testimony offered with respect to the disposition of extracted metal illustrates some of the fine distinctions presented in addressing the disputes presented regarding the issue of preemption, if one focuses on the question of just who is "in control" of the transloading process There is a market for scrap metal, which may have some substantial value Mr Waszen testified as to the disposition of the scrap metal which was extracted at the Facility, indicating that much of that scrap metal was stolen, after it had been extracted from the C&D In the end, however, it was clear that at least some of the scrap metal was sold by Magic, generating some limited income That is apparently consistent with what would have occurred had the materials in question been processed at Magic's solid waste transfer station when it was operating Magic's access to the extracted scrap metal could support the conclusion that it remained in control of the materials in question and the transloading process itself Mr Detlement responded to that issue in his testimony, indicating that the railroad had simply elected "to return" the scrap metal to Magic as it was extracted, suggesting that the railroad had possession and control of the materials in question once they were delivered to the Facility, and was in control of the transloading process

Additional issues were presented as to one specific activity involved in the transloading process at the Facility Testimony as to that issue was apparently offered to

respond to the STB's analysis in New England Transrail LLC, which had concluded that the shredding proposed at the facility at issue in that matter would expose the facility to state and local regulation As already noted, the Pleasantville operation did involve the segregation and extraction of certain materials It did not involve any baling or wrapping, or the type of shredding at issue in New England Transrail LLC NJDEP did, however, present the testimony of John A Castner, a Director of NJDEP, who had concluded that the transloading activity that had occurred at the Pleasantville facility involved the "crushing" of the materials being placed in the railcar In essence, Mr Castner indicated that the excavator being used to lift waste off the floor and deposit it into the railcar was also used to compact the materials within the railcar itself While it is likely some compaction occurred as the excavator was being operated, it is not clear that was an essential part of the transloading process

In addition proofs were presented as to the identity of the individuals involved both in the construction of the building and the transloading process, and the financial relationship between J P Rail and Magic with respect to those activities NJDEP has questioned defendants' claims with respect to those issues, noting there was limited documentation available to corroborate defendants' version of the events This court sees no reason to reject the testimony offered through defendants' representatives on those issues, describing various credits made available to Magic for its assistance in the construction and operation of the Facility Magic's operations begin when it picks up waste from its customers, typically charging them by the ton, with some additional hauling fee Magic is then required to dispose of those materials If Magic was required to dispose of solid waste at other types of facilities, it would ordinarily be charged a fee,

based on the weight of the materials in question Those fees could range from $20 to $50 per ton charged by various landfills The fees charged by a county facility in Atlantic County are in the area of $80 per ton. At the Pleasantville Facility, however, Magic was charged not by the ton, but by the railcar While the Facility was operating, the railroad allowed Magic a number of credits against those charges

Magic supplied the materials used to construct the building and its employees completed the actual construction That was done based on an agreement between Magic and J P Rail, which was not reduced to writing J P Rail was charged $100,000 for the building That $100,000 obligation was satisfied by credits given to Magic by J P Rail against the monies that would otherwise be charged to Magic for the shipment of solid waste once the Facility was operating Those credits were in the amount of $1000 per railcar The $100,000 obligation had essentially been satisfied through those credits by the time the Facility was closed

Similarly, Magic's employees handled the actual transloading of materials all during the time the Facility was operating Materials were brought to the Facility in Magic's trucks and were presumably dumped on the floor by Magic's drivers Magic's employees extracted materials from the waste that had been dumped on the floor The equipment used in the transloading process was owned by Magic Magic's employees operated all of that equipment, including the excavator which was used to move waste from the floor into railcars Magic's employees, however, were not involved in the movement of railcars into or out of the Facility That activity was handled by other individuals, apparently employed directly by the railroad

Defendants acknowledged that the actual transloading of waste was handled entirely by Magic's employees, but indicated that was done under the direction and control of the railroad, through Mr DeClement Defendants all indicated that railroad would ordinarily have charged Magic fees for the transloading of the materials onto its railcars In essence defendants indicated those fees were waived in exchange for the equipment and services provided by Magic This court accepts defendants' description of that financial arrangement [6] By the same token, it is apparent some different arrangement would be necessary if other waste haulers were to use the Pleasantville Facility, as suggested by defendants, at least with respect to waste brought by those other waste haulers

NJDEP has questioned defendants' description of just what occurred at the Pleasantville Facility It is entirely understandable that NJDEP was skeptical of the version of events presented by defendants, suggesting Magic had a very limited role in the development and operation of the Facility A number of circumstances indicated that Magic played a substantial part in the decision to proceed in Pleasantville J P Rail and Magic had worked together in Mullica Township, in an attempt to develop what would be a solid waste transfer station on property owned by Mr Waszen and leased to the railroad An initial contact with Pleasantville was made by Mr Waszen and one of his employees In addition, there clearly have been some inconsistencies in the positions taken by defendants over time Correspondence forwarded to NJDEP by the railroad's attorneys in January 2006 represented that "[n]either Steve Waszen nor his related

[6] The practice of charging a loading fee is apparently recognized in the industry See Judge Haydon's description of the role of shippers and loading agents at the various facilities at issue in N Y Susquehanna At those facilities transloading was handled by loading agents The shippers paid loading fees to the railroad which in turn paid the loading agent

companies are involved in this site in any way "[7] Mr DeClement executed a certification to be filed in this matter in April 2007, describing Logistics as the loading agent for the Facility and indicating that "[t]he loading agent (Logistics) uses its own employees "[8] Defendants' election not to document their agreement as to the construction of the building was also suspicious From the court's perspective, it would be entirely appropriate to conclude that this Facility was the result of a type of joint venture entered into by J P Rail and Magic, at least during the period of construction and initial operation By way of example, it is not at all clear that the railroad would have elected to proceed with the project, but for Magic's willingness to arrange for the construction of the building, and to provide both equipment and personnel to handle the transloading of waste during the initial stages of operation

This court is satisfied, however, that J.P Rail has retained control over the Facility itself and any activities that occur at the Facility Magic did have the right to be reimbursed for the construction of the building, but that has apparently occurred On a day to day basis, Magic was permitted to handle the actual transloading process, in lieu of being charged a separate loading fee There is no indication, however, that the railroad would be prohibited from altering that arrangement at anytime Assuming operations resume, the railroad could presumably elect to acquire its own equipment and to hire its own employees to handle the transloading process at anytime, charging Magic and any other waste haulers who use the Facility a loading fee Alternatively, the railroad might elect to contract with a third party to perform those functions

[7] See Exhibit P 53 in evidence
[8] See Mr DeClement's certification of April 17, 2007

Alleged Violations of the 2D Regulations

NJDEP claims there were a variety of violations of the 2D Regulations during the time the Facility was operating, justifying the closure of the facility until defendants have established their willingness and ability to comply, irrespective of Magic's involvement in the operation NJDEP's complaint alleged violations of nine separate sections of the 2D Regulations [9] Those claims were also framed by correspondence forwarded to J P Rail by NJDEP prior to the filing of suit [10] The proofs at trial were primarily presented through Ms McPeak, an NJDEP employee who visited the Facility frequently, particularly when it was operating

There are separate provisions of the regulations which apply to railroads which transport waste exclusively in sealed containers and those whose operations involve solid waste tipping This Facility was constructed for solid waste tipping and would therefore be subject to the latter provisions, appearing at N J A C 7 26-2D-1(d) There are twenty seven separate subsections to that portion of the regulations NJDEP presented proofs as to a limited number of those subsections Those proofs will be reviewed, with reference to the particular subsections at issue There are a variety of issues presented as to the proper interpretation of the regulations and as to just what occurred at this Facility

N J A C 7 26-2D 1(d)(1) requires that all processing of materials, including storage, occur within the confines of an enclosed building that complies with the provisions of the Uniform Commercial Code (hereinafter "UCC") That section of the regulations raises several discrete issues Plaintiff has suggested that the building constructed by Magic does not comply with the UCC, but did not offer any convincing

[9] See paragraph 38 of the complaint
[10] See Mr Skaer's letter of February 10, 2006, Exhibit P57 in evidence

proofs on that issue (Defendants' witnesses relied on the fact that the plans for the building had been approved by an architect) One could argue that the building, as constructed, is not fully enclosed As already noted, it is open where the tracks enter and leave the building The gate at one side of the building does not extend to the roof, leaving a substantial opening even when the gate is closed This court is not convinced, however, that the building is not adequately "enclosed" to comply with the regulation in question It is clear, however, that some sorting and storage of materials did occur outside the building itself, in violation of the regulation (See, for example, photographs P21, P22 and P32 in evidence, depicting either metals or cardboard being moved out of the area of the building Materials that were extracted were regularly placed in containers outside the building, at least for some limited time)

N J A C 7 26-2D 1(d)(2) and (3) require all facilities to insure the proper containment, collection and disposal of waste water, in part by having "concrete or equivalent" tipping floors and ramps Ms McPeak questioned the adequacy of the defendants' system dealing with waste water, noting that a number of drains had been removed, at least for some period of time As a general matter, this court saw no reason to question Ms McPeak's testimony as to her observations at the Facility, or her own perspective on the dispute as to defendants' compliance By the same token, the regulation does not provide any clear, objective standard by which to measure compliance with respect to this issue Plaintiff simply did not establish a violation of that subsection of the regulations

N J A C 7 26-2D 1(d)(4) requires that the operator clean each area where waste has been deposited "within each 24 hour period " Ms McPeak noted that waste was

sometimes left on the tipping floor at the end of the day That is not necessarily inconsistent with the specific terms of the regulation which does not specify when during the day the area is to be cleaned Plaintiff did not establish a violation of that subsection of the regulations

N J A C 7 26-2D 1(d)(7) requires implementation of "methods of effectively controlling dust to prevent migration outside the enclosed building and off-site " Ms McPeak described defendants' method of controlling dust as a "garden hose," presumably used to water any area where dust might be generated Defendants disputed that description, suggesting only that the hose that was used was somewhat larger than a garden hose It is clear defendants did not have any dust suppression system in place when the Facility first began operating, and never implemented any sophisticated dust suppression system By the same token, the regulation does provide any objective standard for determining whether or not a system which is in place is "effective " Plaintiff did not establish any ongoing violation of that subsection of the regulations

N J A C 7 26-2D 1(d)(9) requires that an adequate water supply and adequate fire-fighting equipment are to be maintained or be readily available Ms McPeak questioned the adequacy what ever arrangements were initially made for fire suppression, but her testimony on that issue was based on what others had told her She also appeared to concede that an appropriate fire suppression system was ultimately in place Mr DeClement testified that the Facility was inspected by the Pleasantville fire inspector who was apparently satisfied with what was presented Plaintiff did not establish an ongoing violation of that subsection of the regulations

N J A C 7 26-2D 1(d)(11) requires that each facility "shall operate certified scales" for certain reporting requirements established under other regulations Ms McPeak noted there were no truck scales at the Facility Defendants noted that Magic was permitted to use truck scales owned by another business located in the immediate area, which was involved in the transloading of other materials with the railroad The regulations do not require that the scales be located at the facility itself Plaintiff did not establish a violation of that subsection of the regulations.

N J A C 7 26-2D 1(d)(12) provides that facilities on-site roadways and storage areas shall have concrete or asphalt paving "in those area subject to vehicle loading and unloading activities " Ms McPeak noted that the roadway was not paved Unfortunately, in the circumstances presented here is unclear just how to define what should be considered "on site " This Facility is located on one portion of a property owned by J P Rail, apparently used for a variety of transloading activities apart from the transloading of solid waste that occurs at the building constructed by Magic While the road leading to the building may be unpaved, the loading and unloading activities at issue here generally occur in or around the building Plaintiff did not establish a violation of that subsection of the regulations

N J A C 7 26-2D 1(d)(21) provides that with the exception of certain materials stored in sealed containers nonputrescible solid waste shall not remain at the rail facility for more than 10 days Ms McPeak's testimony indicated that had occurred at least with respect to materials that had been extracted from the materials initially placed on the tipping floor There were apparently times when materials remained at the facility for as

long as 20 days It does appear there were some violations of that subsection of the regulation

N J A C 7 26-2D 1(d)(23) provides that NJDEP's representatives have the right to enter and inspect any building or other portion of the rail facility at any time It also provides NJDEP has the right to review and copy all records which are required to be maintained by state or federal law N J A C 7 26-2D 1(d)(27) also deals with recordkeeping and NJDEP's right to inspect documents Ms McPeak indicated that certain O&D forms were not maintained when the Facility was first operating She also noted that records were ultimately kept at Mr DeClement's offices, a substantial distance from the facility and were not readily accessible when she visited the Facility While the regulations might be interpreted as requiring all records to be kept at the Facility itself, they are also subject to different interpretations Plaintiff did not establish an ongoing violation of those subsections of the regulations

By way of summary, the court has concluded there were several violations of the 2D Regulations while the Facility was operating, generally involving the processing or storage of materials outside the building By and large, however, plaintiff has failed to establish there were any substantial violations of those regulations which posed a specific threat to public health or safety

Analysis—Preemption

As already noted, a number of courts and the STB have addressed the questions of whether and how ICCTA preempts state regulation of the processing of solid waste which occurs as a part of the transloading process, offering somewhat different perspectives on those questions The issues presented are troubling, as suggested by the

detailed and somewhat conflicting analyses that have been presented The decisions in Hi Tech Trans , LLC, J P Rail, Inc , and N Y , Susquehanna suggest the issue may turn on a fact sensitive analysis, focusing on the issues of ownership or control The STB's decision in New England Transrail LLC suggests the issue may turn on the particular activity involved All those decisions have been considered Indeed, in appropriate circumstances, this court could defer to the analysis offered by any one of the courts in question, or to the STB It is also clear, however, that this court is not bound by those decisions See Dewey v R J Reynolds, 121 N J 69, 80 (1990) (holding that circuit court decisions should be afforded due respect by state courts, but are not binding on them), Glukowsky v Equity One, 180 N J 49, 71 (2004) (holding that federal court decisions are entitled to "respectful consideration in the interest of judicial comity," but are not binding on state courts), Lockhart v Fretwell, 506 U S 364, 376 (1993) (Thomas, J , concurring) (clarifying that a state that follows a circuit court's interpretation of federal law is doing so "because it chooses to and not because it must ") See also Glukowsky, 180 N J at 64 (holding that the interpretation of a statute by a federal agency responsible for enforcing that statute is entitled to substantial deference)

In addressing plaintiff's request for the issuance of a preliminary injunction, this court adopted a very restrictive view on the issue of preemption, concluding in simple terms that ICCTA should not be interpreted as preempting state regulation of the processing of solid waste when that occurs as a part of the transloading process That perspective appears to be consistent with Commissioner Mulvey's dissent in New England Transrail LLC, focusing on the authority and responsibility vested in the states with respect to the handling of solid waste Under that type of analysis, even regulating

through permitting would be permitted' From this court's perspective, the processing of solid waste is qualitatively different from the handling of other materials more typically involved in the transloading process In that context it is reasonable to suggest that the transloading of solid waste should be considered ' transportation to rail" rather than "transportation by rail" irrespective of the identity of the individuals or entities involved in the transloading process, at least when it involves the type of dumping and extraction or segregation of materials involved here. All processing of solid waste, even that *performed by a railroad's own employees, would be subject to state regulation, including* permitting (An entirely different analysis might be appropriate where solid waste is being transported is sealed containers and is not exposed to the environment That circumstance is not presented here) From that perspective, the type of fact sensitive and case specific analysis suggested by Hi Tech Trans , LLC, J P Rail Inc and N Y , Susquehanna may not be necessary The STB's focus on specific activities such as shredding may be misplaced In the end this court is not convinced that Congress intended the preemption provisions of ICCTA to extend to the processing of solid waste Similarly, this court is not convinced Congress intended that the types of distinctions that have developed in the various reported decisions dealing with the matter would be determinative on that issue

In Ridgefield Park the New Jersey Supreme Court concluded that ICCTA preempted permitting, with respect to local zoning and land use regulation, while permitting more limited regulation pursuant to police powers That opinion is obviously binding on this court, and could suggest a different result than that noted above That opinion, however, did not deal with the processing of solid waste It did not deal with the transloading process Indeed, the STB's recent decision in New England Transrail LLC

suggests that agency has concluded that the states may be able to regulate railroad facilities involved in the processing of solid waste, even through permitting, in appropriate circumstances The STB was clearly aware of the body of case law indicating that the states' police powers were not entirely preempted by ICCTA, and cited the opinion in Ridgefield Park in a footnote to the portion of its opinion dealing with that issue New England Transrail, 2007 STB LEXIS 391, *21 n 43 It was in that context that the STB indicated that "[i]f NET chooses to conduct the shredding activities, they would be subject to the full panoply of state and local regulation," clearly suggesting that state permitting of the transloading operation would be appropriate in that circumstance 2007 STB LEXIS 391 at *36

In other circumstances, this court might have been required to resolve the question of whether ICCTA does in fact preempt state regulation of the processing of solid waste by rail carriers through permitting That issue, however, is not presented here As noted above, New Jersey's regulatory scheme, as implemented though NJDEP's own regulations, does not subject rail carriers to the permitting process The permitting issue, under SWMA, is not before this court

NJDEP has attempted to regulate this Facility based on its claim that it is, in essence, a solid waste transfer station being operated by Magic NJDEP's concerns as to that issue are understandable, but the facts established at trial simply do not support that claim In the end, this court is satisfied that J P Rail has retained control over the Facility itself and the transloading process and that it is appropriate to treat this as a railroad facility exempt from permitting under the regulations in question

This court is satisfied, however, that the State's effort to regulate this Facility through the application of the 2D Regulations is not preempted by ICCTA. There are a number of perspectives that can be offered on that issue. First, and most basically, this court is not convinced that ICCTA should be interpreted as preempting state regulation of railroads which elect to become involved in the processing of solid waste. On that basis alone, the 2D Regulations would appear to be an appropriate exercise of New Jersey's authority and responsibility in that area.

J.P. Rail has owned and used the Pleasantville property for a substantial period of time. This court has concluded that J. P. Rail did retain control of the Facility and the transloading process while the Facility was operating, and that it is generally appropriate to treat this as a railroad operation. None of that necessarily limits the State's ability to regulate the Facility. The opinions in Hi Tech Trans., LLC and J.P. Rail, Inc. did prohibit specific transloading operations, based on the involvement of entities other than the railroads, on the theory that those operations involved "transportation to rail" rather than "transportation by rail." Those opinions did not address what regulation would have been permitted, if only the railroads were involved in those operations. At the least, it would appear appropriate to treat the 2D Regulations as the type of limited regulation permitted under the analysis in Ridgefield Park. That is not necessarily inconsistent with the STB's decision in New England Transrail LLC, which does recognize some limits on ICCTA preemption, even in the absence of the type of activity which would subject a railroad to "the full panoply" of state and local regulation.

Accordingly, this court recognizes NJDEP's right to regulate the Pleasantville Facility pursuant to the 2D Regulations but is not convinced NJDEP has the right to

prohibit operations at the Facility based either on Magic's involvement in the transloading process or violations of the regulations themselves NJDEP did establish there were some violations of those regulations at the Pleasantville Facility while it was operating Those violations, however, were relatively limited and would not justify an order prohibiting continued operations The entry of such an order would clearly be problematic Portions of the regulations in question govern the actual transloading operation It is not at all clear how J P Rail would establish it was in full compliance with the regulations if it is not permitted to operate In any event, in the context of this case, the entry of an order prohibiting operation until there was full compliance with the regulations would be the equivalent of requiring permitting, which is not appropriate under the regulations themselves

CAFRA

New Jersey has attempted to regulate the processing of solid waste through SWMA, but has not required railroads to obtain a permit before operating a transloading facility which processes solid waste NJDEP has also asked the court to prohibit the operation of this Facility under CAFRA CAFRA was enacted to regulate development within certain coastal areas and does that primarily through the permitting process See, for example, N J S A 13 19-5 through N J S A 13 19-6 The property at issue here appears to be within the areas which are subject to regulation under CAFRA There is no indication the state has acted to excuse railroads from permitting under CAFRA, as had occurred under SWMA with the enactment of the 2D Regulations in 2004 In that context, one could argue that defendants should not have proceeded with the construction of this Facility without an appropriate permit under CAFRA

This court is satisfied, however, ICCTA does preempt the type of permitting generally required under CAFRA, with respect to railroad property Unlike SWMA, CAFRA does not regulate a specific activity It regulates the development of property within certain specific areas It is akin to the zoning and land use regulations at issue in Ridgefield Park This court is satisfied the New Jersey Supreme Court's opinion in that case bars the state from requiring the issuance of permits prior to the development of railroad property located within areas that are otherwise subject to CAFRA Plaintiff has not established a right to injunctive relief under CAFRA

Conclusion

The preliminary injunction which was previously entered will be vacated J P Rail will be permitted to reopen the Facility, without prior approval from NJDEP, subject to one specific condition related to the controversy presented in this litigation To the extent J P Rail elects to involve Magic in the transloading of materials at this facility, that is to be done pursuant to a written agreement clearly defining Magic's role and the financial arrangements between Magic, J P Rail and SRNJ Logistics NJDEP is to be provided with a copy of any such agreement, as soon as the agreement has been executed Modifications of any such agreement are also to be provided on an ongoing basis

The operation of the Facility will be subject to the 2D Regulations To the extent J P Rail elects to resume operations, NJDEP will have the right to enforce those regulations prospectively NJDEP's representatives shall have the right to visit and inspect the Facility at any time To the extent NJDEP concludes defendants do violate the 2D Regulations in the future, it may proceed against defendants under the enforcement provisions of SWMA See N J S A 3 1E-9, authorizing NJDEP, through the

commissioner, to issue orders, institute civil proceedings, levy civil administrative penalties, bring actions for civil penalties, and to petition the Attorney General to bring criminal actions Depending on the specific action taken, those matters may be pursued in municipal court or in the trial division of Superior Court Alternatively, other actions will be subject to review through the Office of Administrative Law, and on appeal to NJDEP itself and the Appellate Division of Superior Court

Judgment will be entered accordingly

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO 35090

JP RAIL, INC
– LEASE AND OPERATION EXEMPTION –
NAT INDUSTRIES, INC

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION PETITION
TO REVOKE EXEMPTION
OR IN THE ALTERNATIVE TO STAY
EFFECTIVENESS OF EXEMPTION

Exhibit B

State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

JON S. CORZINE
Governor

LISA P. JACKSON
Commissioner

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RE: New Jersey Department of Environmental Protection, Bureau of Solid Waste Compliance and Enforcement, Petitioner, v Magic Disposal, Inc. TS/MRF, Respondent.
OAL Dkt. No. ESW 4763-05

Dear Librarian:

Enclosed please find an Order in the above-referenced matter signed by Lisa P Jackson, Commissioner, Department of Environmental Protection.

Sincerely,

Joan Brown

Encl

c: David M. DeClement, Esq (by fax & certified mail)
Bruce Velzy, DAG (by fax & interoffice mail)

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JON S. CORZINE
Governor

LISA P. JACKSON
Commissioner

DEPARTMENT OF ENVIRONMENTAL PROTECTION, BUREAU OF SOLID WASTE COMPLIANCE AND ENFORCEMENT, Petitioners, v. MAGIC DISPOSAL, INC. TS/MRF, Respondent.	)	**ADMINISTRATIVE ACTION** **FINAL DECISION** OAL DKT NO. ESW 4763-05

The Initial Decision of Administrative Law Judge W. Todd Miller is HEREBY ADOPTED, no timely exceptions having been filed, and the decision being reasonable and properly based upon the record.

IT IS SO ORDERED.

DATE: 11/23/07

Lisa P. Jackson, Commissioner
New Jersey Department of
Environmental Protection

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
BUREAU OF SOLID WASTE COMPLIANCE AND ENFORCEMENT, PETITIONER,
v.
MAGIC DISPOSAL, INC. TS/MRF, RESPONDENT
OAL Dkt No. ESW 4763-05

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State of New Jersey

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A copy of the administrative law judge's decision is enclosed

This decision was mailed to the parties on OCT 15 2007.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO ESW 4763-05
AGENCY DKT NO PEA 050001-131825

DEPARTMENT OF ENVIRONMENTAL PROTECTION, BUREAU OF SOLID WASTE COMPLIANCE AND ENFORCEMENT,
Petitioner,
v
MAGIC DISPOSAL, INC T/S/MRF,
Respondent

Bruce A. Velzy, Deputy Attorney General, for petitioner (Anne M Milgram, Attorney General of New Jersey, Attorney)

David M. DeClement, Esq . for respondent

Record Closed September 7, 2007 Decided October 11, 2007

BEFORE **W. TODD MILLER** ALJ

STATEMENT OF THE CASE

On January 28. 2005, the New Jersey Department of Environmental Protection (NJDEP or Department), through the Director of the Division of County Environmental

and Waste Programs issued a Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) against respondent, Magic Disposal Inc TS/MRF (Magic) in the amount of $700,000 The penalty was imposed after two years of inspections, on twenty different dates, found that Magic violated provisions of the Solid Waste Management Act, N J S A 13 1E-1, et seq , and the related regulations, as well as conditions enumerated in Magic's operating permit and site plan approval Magic primarily disputes the amount of the penalty for equitable and fairness reasons For the reasons discussed below, I **AFFIRM** the penalty imposed by the NJDEP

PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was transmitted to the OAL on July 11, 2005, to be heard as a contested case pursuant to N J S A 52 14B-1 to 15 and 14F-1 to 13 Hearings were held on January 23, 2007, February 8, 2007, March 22, 2007, and June 5, 7, 12 and 15, 2007, in Atlantic City, New Jersey The hearing proceeded on those dates and the record closed upon the receipt of NJDEP's reply brief on September 7, 2007

STIPULATION OF FACTS

April 29, 2002

1 DEP Inspector Ronald Feehan inspected Magic Disposal on April 29, 2002

2 As a result of the April 29, 2002 inspection, DEP issued a Notice of Violation to Magic Disposal c ting violations of Permit Conditions 14 and 23 (See Exhibit P-6)

June 10, 2002

3 DEP Inspector Ron Feehan inspected Magic Disposal on June 10, 2002

4. As a result of the June 10, 2002 inspection, DEP issued a Notice of Violation to Magic Disposal for violation of the SWF Permit Conditions 14 and 16. (See Exhibit P-8)

July 31, 2002

5 DEP Inspector Ron Feehan inspected Magic Disposal on July 31, 2002

6 As a result of DEP's inspection of Magic Disposal on July 31, 2002, it issued a Notice of Violation to Magic Disposal citing violations of SWF Permit Conditions 4, 14 and 15(f) (See Exhibit P-10)

September 18, 2002

7. DEP Inspector Ron Feehan inspected Magic Disposal on September 18, 2002

8 Magic Disposal received solid waste and recyclable material at its transfer station in the following amounts (in excess of 125 tons) and on the following dates

a 9/5/02 144 96 tons
b 9/9/02 140 35 tons
c 9/10/02 180 12 tons

9 As a result of the inspection on September 13, 2002, DEP issued a Notice of Violation to Magic Disposal citing violations of SWF Permit Condition Nos 4, 15f, 15c, 14 and 13 (See Exhibit P-12)

January 17, 2003

10 DEP Inspector Ron Feehan inspected Magic Disposal on January 17 2003

11 Magic Disposal received solid waste and recyclable material in the following amounts (in excess of 125 tons) on the following dates

a 12/3/02 140 29 tons
b 12/4/02 138 78 tons
c 12/5/02 130 47 tons
d 12/6/02 136 70 tons
e. 12/9/02. 147 89 tons
f 12/10/02 243 82 tons
g 12/11/02 155 75 tons
h 12/13/02 221 45 tons
i 12/17/02 159 35 tons
j 12/20/02 198 72 tons
k 12/28/02 191 39 tons
l 1/3/03 166 1 tons
m 1/6/03 177 01 tons
n 1/8/03 165 01 tons
o 1/10/03 150 62 tons

12. As a result of its inspection on January 17, 2003, DEP issued a Notice of Violation to Magic Disposal citing violations of SWF Permit Conditions 4, 15f, 26, 15c and 13 (See Exhibit P-14).

March 7, 2003

13 DEP Inspector Ron Feehan inspected Magic Disposal on March 7, 2003

14 Dumping waste outside Magic Disposal's transfer station building, as set forth in Exhibit J-1 (¶32) violated Condition Nos 4, 13 and 15f of Magic Disposal's SWF permit

15 Magic Disposal received solid waste and recyclable material in the following amounts (in excess of 125 tons) on the following dates

a 2/13/03 149 44 tons
b 2/22/03 170 26 tons
c 2/24/03 135 24 tons
d 3/1/03 143 21 tons

16 As a result of DEP's inspection on March 7, 2003, it issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15 c, 15 f, 23 and 26 (See Exhibit P-16)

May 16, 2003

17 DEP Inspector Ron Feehan inspected Magic Disposal on May 16, 2003

18 Magic Disposal received the following amounts of solid waste and recyclable material (in excess of 125 tons on the following dates

a 5/5/03 283 21 tons
b 5/6/03 147 87 tons

19 As a result of DEP's inspection on May 16, 2003, it issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f and 23 (See Exhibit P-18)

July 22, 2003

20 DEP Inspector Ron Feehan inspected Magic Disposal on July 22, 2003

21 Magic Disposal received the following amounts of solid waste and recyclable material (in excess of 125 tons) on the following dates

a 7/15/03 294 39 tons
b 7/17/03 432 10 tons
c 7/18/03 259 02 tons

22 As a result of DEP's inspection on July 22, 2003, it issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f and 23 (See Exhibit P-20)

September 9, 2003

23 On September 9, 2003, DEP Inspector Ron Feehan inspected Magic Disposal

24 On September 9, 2003, outside the transfer station building and past Magic Disposal's scale, Magic Disposal piled solid waste ID Types 13 and 13C During DEP's inspection, vehicles delivered solid waste to Magic Disposal which was placed on the pile referenced in the prior sentence and then waste was placed from this pile into other solid waste vehicles for off-site disposal

25 On September 9, 2003, outside of Magic Disposal's fenced/paved area, Magic Disposal had piles of

a concrete slabs and smaller pieces mixed with dirt (approx 6' high x 10' wide x 100' long),

b wood, stumps, tree parts and dirt (approx 6' high x 10' wide x 50' long),

c tires (approx. 5' high x 10' wide x 30' long,

d creosote poles of various lengths, from 2' to 12' (in a pile approximately 6' high x 15' wide x 30' long).

e Magic also had a full, tarped 100 cubic yard transfer trailer, a full untarped 100 cubic yard transfer trailer and another transfer trailer containing solid waste

26 The solid waste described in the prior paragraph, stored outside of Magic Disposal's fenced/paved area, violated Magic Disposal's SWF permit condition Nos 4, 13 and 15f

27 Magic Disposal accepted the following amounts of solid waste and recyclable materials (in excess of 125 tons) on the following dates

a 8/2/03 134 65 tons
b 8/8/03 162 98 tons
c 8/11/03 150/39 tons
d 8/12/03 410 10 tons
e 8/14/03 185 3 tons
f 8/16/03 144 42 tons
g 8/20/03 271 90 tons
h 8/22/03 280 37 tons
i 8/27/03 198 33 tons
j 8/28/03 156 74 tons

28 As a result of its inspection on September 9, 2003, DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f, 22 and 23 (See Exhibit P-23)

October 9, 2003

29 DEP Inspector Ron Feehan inspected Magic Disposal on October 9, 2003

30 Magic Disposal accepted the following amounts of solid waste and recyclable material (in excess of 125 tons) on the following dates

a 9/4/03 132 77 tons
b 9/9/03 127 08 tons
c 9/13/03 348 15 tons
d 9/18/03 146 76 tons
e 9/19/03 157 73 tons
f 9/23/03 394 54 tons
g 9/26/03 167 47 tons

October 23, 2003

31 On October 23, 2003, DEP Inspectors Ron Feehan and Bob Harkin inspected Magic Disposal

32 Magic Disposal accepted the following amounts of solid waste and recyclable material (in excess of 125 tons) on the following dates

a 10/10/03 311 6 tons
b 10/11/03 168 36 tons
c 10/17/03 211 33 tons
d 10/20/03 204 12 tons

33 As a result of its inspection on October 23, 2003, DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f, 22 and 23 (See Exhibit P-28)

January 8, 2004

34 On January 8, 2004, DEP Inspector Ron Feehan inspected Magic Disposal

35 On January 8, 2004, when Magic Disposal deposited and loaded cardboard in trailers outside the transfer station building (Exhibit J-1, ¶40) and when solid waste was dumped outside Magic Disposal's transfer station building in an unapproved area (Exhibit J-1 ¶41), Magic Disposal violated its SWF Permit Condition Nos 4 and 15f

36 Due to a backup caused by the New Years holiday season, solid waste had been deposited overnight between January 8, 2004 and January 9, 2004 on Magic Disposal's transfer station tipping floor

37 The backlog of solid waste caused by the New Years holiday season violated Magic Disposal's SWF Permit Condition 13

38 Due to a backup caused by the New Years holiday season, solid waste had been deposited overnight between January 8, 2004 and January 9, 2004 on Magic Disposal s transfer station tipping floor

39 Magic Disposal accepted the following amounts of solid waste and recyclable material (in excess of 125 tons) on the following dates

a 12/10/03 140 52 tons
b 12/12/03 279 87 tons
c 12/19/03 170 29 tons

40 As a result of its inspection on January 8, 2004, DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15f, and 23 (See Exhibit P-30)

February 27, 2004

41 On February 27, 2004, DEP Inspector Ron Feehan inspected Magic Disposal

42 On February 27, 2004, paste the scale, Magic Disposal had allowed a pile of bulky wastes (approx 15' high x 45' long x 30' wide) such as construction and demolition waste and furniture and other objects (solid waste ID Types 13 and 13C) to be deposited in its outdoors yard, extending into the entrance of the transfer station building

43 On February 27, 2004, Magic Disposal stored a pile of metal salvage along a fence, in the transfer station yard, which separates the approved paved facility from an unpaved area

44 As a result of its inspection on February 27, 2004, DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f, 23 and 26 (See Exhibit P-32)

FINDINGS OF FACT

The findings of fact provided below are those embodied in the NJDEP's closing submission I have adopted these proposed findings as mine They are well organized, consistent with my notes and are supported by extensive references to the transcripts or documents in evidence The presentation of the violations is by date of occurrence culminating over a two year period beginning February 6, 2002, to December 8, 2004 It also provides factual summaries supporting the basis for the penalty together with facts supporting the need for deterrence

A Magic Disposal's Transfer Station

1 Between January 1, 2002 and January 1, 2005, Magic Disposal operated a solid waste facility located at Ridge Avenue & Jefferson Ave, Lot 65, Block 1807, Egg Harbor Twp , Atlantic County, New Jersey, with DEP solid waste ID# 131825 Exh J-1, ¶1

2 The Magic Disposal solid waste facility was permitted by the Department of Environmental Protection ("DEP" or "the Department") as transfer station and materials recovery facility Exh J-1, ¶2

3 A transfer station is a solid waste facility at which solid waste is transferred from one solid waste vehicle to another solid waste vehicle for transportation to an off-site solid waste facility Exh J-1, ¶3

4 A materials recovery facility (or "MRF") is a solid waste facility such as a transfer station which is primarily designed, operated and permitted to process a nonhazardous solid waste stream by utilizing manual and/or mechanical methods to separate from the incoming waste stream categories of useful materials which are then returned to the economic mainstream in the form of raw materials or product of reuse Exh J-1, ¶4

B Magic Disposal's Permit

5 The Department issued a solid waste facility ("SWF") permit to Magic Disposal on June 7, 1996, which was modified on August 13, 1998 Exh J-1, ¶5

6 The Department denied renewal of Magic Disposal's SWF permit on January 27, 2005 and Magic Disposal's SWF at Jefferson & Ridge Avenues is no longer operational Exh J-1, ¶6

7 Magic Disposal's SWF permit allowed it to accept for processing and transfer the following waste ID types

a ID Type 10 - Municipal Waste (household, commercial, and institutional)

b ID Type 13 - Bulky Waste

c ID Type 13C - Construction & Demolition Waste Exh J-1, ¶7

8 Condition 12 of Magic Disposal's SWF Permit allowed it to accept solid waste for processing between 7 00 am and 10 00 pm, Sunday through Saturday Exh J-1, ¶8

9 Condition 12 of Magic Disposal's SWF Permit allowed it to process solid waste between 7 00 am and 10 00 pm, Sunday through Saturday Exh J-1, ¶9

10 Condition 13 of Magic Disposal's SWF Permit allowed it to receive a maximum of 125 tons of solid waste and/or source separated recyclable materials each day, but no more that 696 5 tons of solid waste and/or source separated recyclable materials each week Exh J-1, ¶10 This daily tonnage limitation includes both solid waste and source-separated recyclables N J A C 7 26-2 11(b)10

11 Condition 13 of Magic Disposal's SWF Permit allowed solid waste to be deposited only in areas within its transfer building specifically identified in the design drawings set forth in SWF Permit Condition 4 Exh J-1, ¶11 See also, N J A.C 7:26 2B 5(b)2 (" Facilities shall be designed with facility processing, tipping, sorting, loading. storage and compaction areas located within the confines of an enclosed building), Exh P-1, Exh. P-58, Exh P-59, page 3 (Response to Comment 4)

12 Condition Nos 4 (the site plan) and 15f of Magic Disposal's permit required the dumping and processing/handling of cardboard inside the transfer station building Feehan, Tr1@52-60, Byrne, June 5, 2007, Wayne Norman, Tr7@26(24)-27(3), Steve Waszen, Tr7@125(15-19) See also, N J A C 7 26 2B 5(b)2

13 Condition 13 of Magic Disposal's SWF Permit required that no solid waste shall be deposited beyond the confines of the transfer station building Exh J-1, ¶12 N J A C 7 26 2B 5(b)2

14 Condition 13 of Magic Disposal's SWF Permit required Magic Disposal to "process the amount of solid waste that is delivered to it on any given operating day " Exh J-1, ¶13

15 Condition 14 of Magic Disposal's SWF Permit stated that, "[n]o solid waste shall be allowed to remain on the tipping floor overnight " Exh J-1, ¶14 N J A C 7 26-2 11(b)2

16 Condition 15a of Magic Disposal's SWF Permit required that all solid waste residue (other than certain recyclable materials) be cleared from the solid waste facility so that no solid waste remains overnight on the tipping floor Exh J-1, ¶15 N J A C 7 26-2 11(b)2

17 Condition 15c of Magic Disposal's SWF Permit required that a "movable concrete barrier or equivalent type of barricade shall be in place when both the material recovery activities from solid waste and source separated recyclable material activities are occurring, to physically separate the solid waste tipping, processing and storage areas " Exh J-1, ¶16

18 Condition 15f of Magic Disposal's SWF Permit required that all solid waste processing and storage shall occur inside the transfer station building Exh J-1, ¶17

a See, Exh P-1, Condition 15f ("All processing and storage of solid waste and all other related waste processing activities shall be performed within

the confines of the facility property as depicted in the approved engineering design and as explained is the documents submitted in support of this permit, referenced in Condition No 4, and is restricted to the property identified as Block 1807 Lot 65 ")

b See also, N J A C 7 26 2B 5(b)2,
c Exh P-58, Exh P-59, page 3 (Response to Comment 4),
d Testimony of Thomas Byrne, June 5, 2007

19 Condition 16 of Magic Disposal's SWF Permit allowed "only solid waste collector/hauler vehicle properly registered with the Department to deliver and deposit waste at the facility " Exh J-1, ¶18 N J A C 7 26-2 11(c)1

20 Condition 22 of Magic Disposal's SWF permit required, " . the facility systems and related appurtenances shall, at all times, be kept in proper operating order " Exh P-1, N J A C 7 26-2 11(b)6

21 Condition 23 of Magic Disposal's SWF Permit required "all areas where solid waste has come in contact shall be washed daily " Exh J-1, ¶19 N J A C 7 26-2 11(b)1

22 Condition 23 of Magic Disposal's SWF Permit required all "facility floor drains, sumps and catchment basins shall be maintained free of obstruction to facilitate effluent drainage ' Exh J-1, ¶20 N J A C 7 26-2B 5-(b)1

23 Condition 26 of Magic Disposal's SWF Permit required "Air Pollution Control Equipment shall be in operation during all hours of facility operation " Exh J-1, ¶21 N J A C 7 26-2B 5-(b)7

C Magic Disposal Transfer Station Activities and Permit Violations

February 6, 2002

24 On February 6, 2002, Magic Disposal allowed loads of bulky waste to be dumped outside of its transfer building, Exh J-1, ¶22

25 Magic Disposal's dumping of bulky waste outside of its transfer station building violated SWF Permit Condition No 13 Feehan, Tr1@34 (10-23)

26 On February 6, 2002, when it was inspected by DEP and while Magic Disposal was operating, Magic Disposal did not have its air pollution control equipment turned on Exh J-1, ¶23

27 Magic Disposal's turning off of its air pollution control equipment on February 6, 2003, violated SWF Permit Condition No 26 Feehan, Tr1@36 (8-23)

28 On February 6, 2002, when it was inspected by DEP Magic Disposal's transfer station building contained bulky wastes which had been stored overnight Exh J-1, ¶24

29 The overnight storage of waste at Magic Disposal violated SWF Permit Condition No 14 Feehan, Tr1@37(16) - 38 (1)

30 On January 4, 2002, Magic Disposal received solid waste and recyclable material in excess of 125 tons Exh J-1, ¶25

31 The receipt of solid waste and recyclable materials on January 4, 2002, in excess of 125 tons, violated Magic Disposal's SWF Condition No 13 Feehan, Tr1@38 (2-18), 40 (1-6)

32 As a result of the February 6, 2002 inspection, DEP issued a Notice of Violation to Magic Disposal citing violations of Permit Condition Nos 13, 14 and 26 See Exhibit P-4

April 29, 2002

33 DEP Inspector Ronald Feehan inspected Magic Disposal on April 29, 2002 Exh J-2, ¶1

34 On April 29, 2002, Magic Disposal had failed to clean its tipping floor from the prior day's waste handling and processing activities Exh P-5, Feehan, Trl@117 (12-22)

35 Magic Disposal's failure to clean its tipping floor violated Condition 23 of Magic Disposal's solid waste facility permit Exh P-5, Feehan, Trl@117(23)-122(13)

36 Magic Disposal stored solid waste on its transfer station tipping floor overnight between the night of April 28, 2002 and the morning of April 29, 2002 Exh P-5, Feehan, Trl@117(12-22)

37 Magic Disposal's overnight storage of solid waste on its tipping floor on April 28, 2002 violated Condition 14 of Magic Disposal's solid waste facility permit Exh P-5, Feehan Trl@117(23)-122(13)

38 As a result of the April 29, 2002 inspection, DEP issued a Notice of Violation to Magic Disposal citing violations of Permit Conditions 14 and 23 See Exhibit P-6 Exh J-2, ¶2

June 10, 2002

39 DEP Inspector Ron Feehan inspected Magic Disposal on June 10, 2002 Exh J-2, ¶3

40 Magic Disposal, according to its site foreman, stored solid waste on its transfer station tipping floor overnight between the night of June 9, 2002 and the morning of June 10, 2002. Exh P-7. Feehan, February 8, 2007 [1]

40 Magic Disposal's overnight storage of solid waste on its transfer station tipping floor violated Condition 14 of Magic Disposal's solid waste facility permit Exh P-7, Feehan, February 8, 2007

41 On June 10, 2003, in the area on Magic Disposal's site plan designated for storage of empty containers, Magic Disposal had three 40 cu yd roll off compactor containers filled with waste Exh P-7, Feehan, February 8, 2007

42 The storage of containers full of waste in the empty storage area site violated Magic Disposal's SWF Permit Condition No 4 Exh P-7, Feehan, February 8, 2007

43 On June 10, 2002, Magic Disposal had at its facility two solid waste vehicles loaded with solid waste which were not registered with the Department Exh P-7, Feehan, February 8, 2007

44 The presence of an unregistered solid waste vehicle at Magic Disposal violated Condition 16 of Magic Disposal's solid waste facility permit Exh P-7, Feehan, February 8, 2007

45 As a result of the June 10, 2002 inspection, DEP issued a Notice of Violation to Magic Disposal for violation of SWF Permit Conditions 14 and 16 See Exh P-8, Exh J-2, ¶4

July 31, 2002

46 DEP Inspector Ron Feehan inspected Magic Disposal on July 31, 2002 Exh J-2, ¶5

47 On July 31, 2002 Magic Disposal had dumped a load of cardboard mixed with solid waste (approximately 10' high x 30' wide x 6' long) outside of its transfer station building and Magic's workers were removing the solid waste residue from that cardboard outside of Magic Disposal's transfer station building Exh P-4, Feehan, February 8, 2007

48 This outdoor deposit and processing of cardboard with solid waste mixed in violated with Conditions 4 and 15(f) of Magic Disposal's SWF permit Exh P-9, Feehan, February 8, 2007

49 On July 30, 2002, in the area past the fence and improved surface, Magic Disposal had three piles of dirt mixed with concrete pieces and vinyl siding

[1] DEP did not order a transcript for February 8 2007, so DEP will generically refer to the fact that Ron Feehan testified on February 8, 2007 about the violations between June 10, 2002 and July 22, 2003 based on the NJEMS reports and inspection narratives from those dates that were admitted into evidence

pieces. one small pile of tires. and one pile of stone Exh P-9. Feehan. February 8, 2007

50 The piles of dirt mixed with concrete, vinyl siding license, tires, and stones violated Magic Disposal's SWF Permit Conditions 4 and 15f Exh P-9, Feehan, February 8, 2007

51 Magic Disposal stored solid waste on its transfer station tipping floor overnight between the night of July 30, 2002 and the morning of July 31, 2002 See Exh P- 9 (Waszen explained that the cardboard load was dumped outside because the building door was closed, more waste was on the tipping floor than had been received that day, and Waszen did not disagree when Feehan said it was to Waszen's "advantage to clear the tipping floor areas daily to avoid these violations "), Feehan, February 8, 2007 (66 cu yds of cardboard and solid waste outside the transfer station and 333 cu yds of solid waste on the tipping floor) [2]

52 Magic Disposal's overnight storage of solid waste on its transfer station tipping floor violated Condition 14 of Magic Disposal's solid waste facility permit Exh P-9, Feehan, February 8, 2007

53 As a result of DEP's inspection of Magic Disposal on July 31, 2002, it issued a Notice of Violation to Magic Disposal citing violations of SWF Permit Conditions 4, 14 and 15(f) See Exh P-10 Exh J-2, ¶6

September 18, 2002

54 DEP Inspector Ron Feehan inspected Magic Disposal on September 18, 2002 Exh J-2, ¶7

55 On September 18, 2002, Magic Disposal did not use a movable barrier to separate its cardboard processing area from its solid waste area in its transfer station building Exh J-1, ¶26

56 Magic Disposal's failure to use a movable barrier to separate its cardboard processing area from its solid waste area in its transfer station building on September 18, 2002 violated Magic's SWF Permit Condition No 15c Exh P-11, Feehan, Tr1@40(7-19)

57 On September 18, 2002, Magic Disposal stored solid waste on its floor overnight Exh J-1, ¶27

[2] The cubic yardage of waste referred to in the Proposed Findings of Fact were either set forth in Feehan's inspection narratives, Exhs P-7 to P-16, in his testimony on February 8, 2007, or can be derived approximately from multiplying the piles of waste or cardboard by length x width x height and then divide it by 27

58 The overnight storage of solid waste by Magic Disposal on its transfer station tipping floor on September 27, 2002 violated Condition 14 of Magic Disposal's SWF Permit Exh P-11. Feehan, Tr1@ 40(20)-41(2)

59 Magic Disposal received solid waste and recyclable material at its transfer station the following amounts (in excess of 125 tons) and on the following dates

a 9/5/02 144 96 tons

b 9/9/02 140 35 tons

c 9/10/02 180 12 tons
Exh J-2, ¶8

60 The receipt of solid waste and recyclable materials on the three dates cited in the prior paragraph, in excess of 125 tons, violated Magic Disposal's SWF Condition No 13 Exh P-11, Feehan, February 8, 2007

61 On September 18, 2002, Magic Disposal had two loads of cardboard dumped outside of its transfer station building Exh P-11, Feehan, February 8, 2007

62 The outdoor dumping of cardboard violated Conditions 4 and 15(f) of Magic Disposal's SWF permit Exh P-11, Feehan, February 8, 2007

63 On September 18, 2002, Magic Disposal dumped outdoors at its transfer station, in the area beyond its fence piles of tree stumps, concrete mixed with dirt, tires wallboard pieces and plastic and wooden pallets Exh P-11, Feehan, February 8, 2007

64 The dumping of poles, tree stumps, concrete mixed with dirt, tires, wallboard pieces and plastic and wooden pallets beyond Magic Disposal's fence violated Condition No 4 of Magic Disposal's SWF permit Exh P-11, Feehan, February 8, 2007

65 As a result of the inspection on September 13, 2002, DEP issued a Notice of Violation to Magic Disposal citing violations of SWF Permit Condition Nos 4, 15f, 15c, 14 and 13 See Exh P-12, Exh J-2, ¶ 9

January 17, 2003

66 DEP Inspector Ron Feehan inspected Magic Disposal on January 17, 2003 Exh J-2, ¶10

67 On January 17, 2003, Magic Disposal violated SWF permit Approval Condition 4 (site plan) Exh J-1, ¶28, Feehan, Tr1@41(3-20)

68 On January 17, 2003, cardboard and solid waste was deposited on Magic Disposal's property outside its transfer station building Exh J-1, ¶29

69 The outdoor deposit of cardboard and solid waste on Magic Disposal's property outside its transfer station building violated its SWF Permit Condition No 13. Exh P-13, Feehan, Tr1@41(21)-42(12)

70 On January 17, 2003, when DEP inspected it, Magic Disposal's air handler was not turned on during cardboard processing operations Exh J-1, ¶30.

71 Magic Disposal s failure to turn on its air handler during cardboard processing operations on January 17, 2003, violated Magic Disposal's SWF Permit Condition No 26 Exh P-13, Feehan, Tr1@41(21)-42(13-20)

72 On January 17, 2003, when DEP inspected it, Magic Disposal did not use a concrete barrier to separate its cardboard recycling area from its solid waste area inside its transfer station building Exh J-1, ¶31

73 Magic Disposal's failure to use a concrete barrier between the solid waste and recyclable areas violated SWF Permit Condition No 15c Exh P-13, Feehan, Tr1@42(21)-43(7)

74 On January 17, 2003, ID Type 13 solid waste covered by snow (approx 8' high x 20' wide x 20' long) was deposited outside the transfer station building behind the scale Exh P-13, Feehan, February 8, 2007

75 The deposit of ID Type 13 solid waste outside the transfer station building, behind the scale, violated Magic Disposal's SWF Permit Condition No 15f, as did the solid waste and cardboard deposited outside its transfer station building

76 Magic Disposal received solid waste and recyclable material in the following amounts (in excess of 125 tons) on the following dates

a 12/3/02 140 29 tons

b 12/4/02 138 78 tons

c 12/05/02 130 47 tons

d 12/6/02 136 70 tons

e 12/9/02 147 89 tons

f 12/10/02 243 82 tons

g 12/11/02 155 75 tons

h 12/13/02 221 45 tons

i 12/17/02 159 35 tons

j 12/20/02 198 72 tons

k 12/28/02 191 39 tons

l 1/3/03 166 1 tons

m 1/6/03 177 01 tons

n 1/8/03 165 01 tons

o 1/10/03 150 62 tons
Exh J-2, ¶11

77 The receipt of solid waste and recyclable materials on the dates cited in the prior paragraph, in excess of 125 tons, violated Magic Disposal's SWF Condition No 13 Exh P-13 Feehan, February 8, 2007

78 As a result its inspection on January 17, 2003, DEP issued a Notice of Violation to Magic Disposal citing violations of SWF Permit Conditions 4, 15f, 26, 15c and 13 See Exh P-14, Exh J-2, ¶12

March 7, 2003

79 DEP Inspector Ron Feehan inspected Magic Disposal on March 7, 2003 Exh J-2, ¶13

80 On March 7, 2003, when DEP inspected it, Magic Disposal had allowed waste to be deposited beyond the confines of its transfer station building Exh J-1, ¶32

81 Magic Disposal's dumping of waste outside its transfer station building, as set forth in Exh J-1 (¶32) violated Condition Nos 4, 13 and 15f of Magic Disposal's SWF permit Exh J-2, ¶14, Feehan, Tr1@ 43 (8-18)

82 On March 7, 2003, when the Department inspected it, Magic Disposal did not provide a movable barrier between its transfer station waste processing area and its recycling area Exh J-1, ¶33

83 On March 7, 2003, Magic Disposal violated SWF Permit Condition No 15c when it did not provide a movable barrier between its transfer station waste processing area and its recycling area Exh P-15, Feehan, Tr1@43 (19)-44(4)

84 On March 7, 2003, when DEP inspected it, Magic Disposal was not operating its transfer station air handler while workers were processing material inside the building Exh J-1, ¶34

85 On March 7, 2003, when Magic Disposal was not operating its transfer station air handler while workers were processing material inside the building, Magic Disposal violated SWF Permit Condition No 26 Exh P-15, Feehan, Tr1@44 (5-16)

86. On March 7, 2003, Magic Disposal loaded ID Type 13 solid waste from the yard, outside of Magic Disposal's transfer station building, into a transfer trailer Exh P-15, Feehan, February 8, 2007

87 The outdoor deposit and then loading of ID Type 13 waste into a transfer trailer violated Magic Disposal's SWF Permit Condition Nos 4, 13, and 15f Exh P-15, Feehan, February 8, 2007

88 On March 7, 2003, Magic Disposal stored two trailers containing a mixture of waste ID Types 10 and 13 in the area on the site plan designated for empty containers Exh P-15, Feehan, February 8 2007

89 The storage of trailers containing solid waste in the area designated for empty containers violated Magic Disposal's SWF Permit Condition Nos 4, 13 and 15f Exh P-15, Feehan, February 8, 2007

90 On March 7, 2003, Magic Disposal deposited a pile of concrete on the ground beyond its facility fence Exh P-15, Feehan, February 8, 2007

91 Depositing concrete on the ground outside its transfer station fence violated Condition Nos 4, 13 and 15f of Magic Disposal's SWF permit Exh P-15, Feehan, February 8, 2007

92 From the evening of March 6, 2003 until the morning of March 7, 2003, Magic Disposal stored ID Type 13 waste overnight on its transfer station tipping floor Exh P-15 (Magic had waste on its tipping floor even though it had not received any waste as of the time of the inspection, there was approximately 160 cu yds of cardboard outside the transfer station, Type 13 solid waste was being loaded *into a truck outside the transfer station, "Waszen advised [Feehan] that he* was [catching] up on disposing of waste which had accumulated at the facility as a result of recent snow .', and 2/3rds of the tipping floor was covered with waste, from the "bay next to the top loading ramp into the area where the cardboard/paper processing activities occur "), Feehan, February 8, 2007

93 The overnight storage of solid waste on Magic Disposal's transfer station tipping floor violated Magic Disposal's SWF permit condition No 14 Exh P-15, Feehan, February 8, 2007

94 Magic Disposal received solid waste and recyclable material in the following amounts (in excess of 125 tons) on the following dates

a 2/13/03 149 44 tons

b 2/22/03 170 26 tons

c 2/24/03 135 24 tons

d 3/01/03 143 21 tons

Exh J-2, ¶15

95 The receipt of solid waste and recyclable materials on the dates cited in the prior paragraph, in excess of 125 tons, violated Magic Disposal's SWF Condition No 13 Exh P-15, Feehan, February 8, 2007

96 On March 7, 2003, when the Department inspected it, Magic Disposal's transfer station tipping floor drain was covered with waste Exh P-15, Feehan, February 8, 2007.

97 The covering of Magic Disposal's tipping floor drain violated Magic Disposal's SWF Permit Condition No 23 Exh P-15, Feehan, February 8, 2007

98 As a result of DEP's inspection on March 7, 2003, it issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f, 23 and 26 See Exh P-16, Exh J-2, ¶16

May 16, 2003

99 DEP Inspector Ron Feehan inspected Magic Disposal on May 16, 2003. Exh J-2 ¶17

100 On May 16, 2003, when DEP inspected it, Magic Disposal was not using a movable barrier to separate solid waste from recyclable materials Exh J-1, ¶35

101 On May 16, 2003, when Magic Disposal was not using a movable barrier to separate solid waste from recyclable materials, it violated SWF Permit Condition No 15c Exh P-17, Feehan, Tr1@44(17)-45(2)

102 On May 16, 2003, Magic Disposal piled loose cardboard (approx 10' high x 40' wide x 60' long or 888 cu yds) in the transfer station yard area outside the transfer station bay where cardboard is sorted and baled Exh P-17, Feehan, February 8, 2007

103 On May 16, 2003, Magic Disposal also dumped a large pile of mostly ID Type 13 and ID 13C solid waste (500 cu yds) in the yard area outside the transfer station building Exh P-17, Feehan, February 8, 2007

104 On May 16, 2003, Magic Disposal had piled dirt mixed with wood, dirt mixed with concrete, mattresses and tires outside of the paved/fenced area on its site plan Exh P-17, Feehan, February 8, 2007

105 Magic Disposal's piling of loose cardboard and ID Type 13 and 13C solid waste outside the transfer station building, and the dirt, wood, concrete, mattresses and tires outside the paved/fenced area, violated Magic Disposal's SWF Permit Approval Condition Nos 4, 13 and 15f Exh P-17, Feehan, February 8, 2007

106 Between the evening of May 15 and the morning of May 16, 2003, Magic Disposal stored solid waste overnight on its transfer station tipping floor Exh P-17 (500 cu yds of waste outside the transfer station, approx. 888 cu yds of

cardboard outdoors, only one load of waste delivered that morning, "tipping floor totally consumed with waste piled approximately 10' in height", Wayne Douglas explained that "grappler equipment could not use the tipping floor while the concrete cured"), Feehan, February 8, 2007

107 The overnight storage of solid waste on Magic Disposal's transfer station tipping floor violated Magic Disposal's SWF permit condition No 14 Exh P-17, Feehan, February 8, 2007

108 Magic Disposal received the following amounts of solid waste and recyclable material (in excess of 125 tons) on the following dates·

a May 5, 2003 - 283 21 tons

b May 6, 2003 - 147 87 tons
Exh J-2, ¶18

109 The receipt of solid waste and recyclable materials on the dates cited in the prior paragraph, in excess of 125 tons, violated Magic Disposal's SWF Condition No 13 Exh P-17, Feehan, February 8, 2007

110 On May 16, 2003, the tipping floor area was totally covered with waste piled approximately 10' high and spilling outside into the yard area and covering the drains at the entrance to the transfer station tipping floor Exh P-17, Feehan, February 8, 2007

111 The covering of the drains violated Magic Disposal's SWF Permit Condition No 23 Exh P-17,-Feehan, February 8, 2007

112 The waste spilling out from inside the transfer station tipping floor violated Magic Disposal's SWF Permit Condition Nos 4 and 15f Exh P- 17, Feehan, February 8, 2007

113 As a result of DEP's inspection on May 16, 2003, it issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f and 23 See Exh P-18, Exh J-2, ¶19

July 22, 2003

114 DEP Inspector Ron Feehan inspected Magic Disposal on July 22, 2003 Exh J-2, ¶20

115 On July 22, 2003. there was a pile of loose cardboard (approximately 12' high x 30' wide x 50' long or 600 cu, yds) dumped in Magic Disposal's yard near the scale house outside the transfer station building Exh P-19. Feehan, February 8, 2007

116 On July 22, 2003, just Magic Disposal's scale, a pile of solid waste ID Types 13 and 13C (approximately 15' high x 40' wide x 150' long or 3000 cu yds) was

dumped in Magic Disposal's yard outside its transfer station building Exh P-19 Feehan, February 8, 2007

117 The waste and cardboard dumped in Magic Disposal's yard outside its transfer station building violated Magic Disposal's SWF Permit Approval Condition Nos 4, 13 & 15f Exh P-19, Feehan, February 8, 2007

118 On July 22, 2003, outside of Magic Disposal's fenced/paved area, Magic Disposal had piles of.

a concrete slabs and smaller pieces mixed with dirt (approx 6' high x 10' wide x 60' long),
b wood, stumps, tree parts and dirt (approx 6' high x 10' wide x 40' long),
c tires (approx 5' high x 10' wide x 30' long), and
d Magic also had a full, tarped 100 cubic yard transfer, a full untarped 100 cubic yard transfer trailer and another transfer trailer containing solid waste

Exh P-19, Feehan, February 8, 2007

119 The solid waste described in the prior paragraph, stored outside of Magic Disposal's fenced/paved area, violated Magic Disposal's SWF permit condition Nos 4 and 15f Exh P-19, Feehan, February 8, 2007

120 On July 23, 2003, Magic Disposal had 12 bales of newspaper on the transfer station floor, but no barrier was present separating solid waste from recycling activities in the transfer station building Exh P-19, Feehan, February 8, 2007

121 The absence of a barrier between solid waste and recycling activities violated Magic Disposal's SWF Permit Condition 15c Exh P-19, Feehan, February 8, 2007

122 On July 22, 2003, Magic Disposal did not clean its transfer station tipping floor Exh P-19, Feehan, February 8, 2007

123 Magic Disposal's failure to clean its transfer station tipping floor violated its SWF Permit Condition No 23 Exh P-19, Feehan, February 8, 2007

124 Between the evening of July 21 and the morning of July 22, 2003, Magic Disposal stored solid waste overnight on its transfer station tipping floor Exh P-19 (only 30 cu yds of waste delivered before inspection, 600 cu yds of cardboard and 3000 cu yds of solid waste outside the transfer station building, 290 cu yds of waste indoors, "waste deposited outside the building blocked the entrance to the tipping floor") , Feehan, February 8, 2007

125 The overnight storage of solid waste on Magic Disposal's transfer station tipping floor violated SWF Permit Condition No 14 Exh P-19, Feehan, February 8, 2007

126 Magic Disposal received the following amounts of solid waste and recyclable material (in excess of 125 tons) on the following dates:

a July 15, 2003 - 294 39 tons,

b July 17, 2003 - 432 10 tons,

c July 18, 2003 - 259 02 tons
Exh J-2, ¶21

127 The receipt of solid waste and recyclable materials on the dates cited in the prior paragraph, in excess of 125 tons, violated Magic Disposal's SWF Condition No 13 Exh P-19, Feehan, February 8, 2007

128 As a result of DEP's inspection on July 22, 2003, it issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f and 23 See Exh P-20, Exh J-2, ¶22

September 9, 2003 [3]

129 On September 9, 2003, DEP Inspector Ron Feehan inspected Magic Disposal Exh J-2, ¶23

130 On September 9, 2003, Magic Disposal failed to provide a movable barrier in its transfer station building to separate solid waste activities from source separated recyclable material activities Exh J-1, ¶36

131 On September 9, 2003, when Magic Disposal was not using a movable barrier to separate solid waste from recyclable materials, it violated SWF Permit Condition No 15c Exh P-21, Feehan, Trl@45(3-14)

132 On September 9, 2003, a pile of loose cardboard was dumped outside the transfer station building in a pile 10' high x 30' wide x 50' long (approx 555 cubic yards). Magic Disposal workers were manually separated non-recyclable materials from the pile of solid waste The cardboard was piled against bales of solid waste such as mixed plastic and paper Exhs P-21; Exhs P22A-22C (pictures)

133 The removal of non-recyclable materials from the pile of loose cardboard, on September 9, 2003, violated Magic Disposal's SWF permit approval conditions 4 and 15f Exh P-21

134 On September 9, 2003, outside the transfer station building and past Magic Disposal's scale, Magic Disposal piled solid waste ID Types 13 and 13C with the

[3]On March 22, 2007 the parties agreed to use Ron Feehan's inspection reports and Compliance Evaluator Reports as his direct testimony for all violation dates from September 9 2003 through December 8, 2004 DEP will thus be relying on those reports as its evidence of the occurrence of those dates violations and the permit conditions which were violated by Magic's conduct

approximate dimensions of 12' high x 50' wide x 160' long (approx 3555 cubic yards) During DEP's inspection, vehicles delivered solid waste to Magic Disposal which was placed on the pile referenced in the prior sentence and then waste was taken from this pile and placed into solid waste vehicles for off-site disposal Exh. J-2, ¶24 See also, Exh P-22A, P-22E, P-22P & P-22Q (pictures)

135 The outdoor piling, dumping and loading of solid waste referenced in the prior sentence violated Conditions 4, 13 and 15f of Magic Disposal's SWF permit Exh P-21

136 On September 9, 2003, outside of Magic Disposal's fenced/paved area, Magic Disposal had piles of

a concrete slabs and smaller pieces mixed with dirt (approx 6' high x 10' wide x 100' long),
b. wood, stumps, tree parts and dirt (approx 6' high x 10' wide x 50' long),
c tires (approx 5' high x 10' wide x 30' long),
d several mobile homes beyond repair (ID Type 13 solid waste), and
e Magic also had a full, unmarked self-contained compactor roll-off box and one transfer trailer containing waste

Exh J-2, ¶25 See also Exhs P-22F to P-22O (pictures)

137 The solid waste described in the prior paragraph, stored outside of Magic Disposal's fenced/paved area, violated Magic Disposal's SWF permit condition Nos 4, 13 and 15f Exh J-2, ¶26

138 Magic Disposal accepted the following amounts of solid waste and recyclable material (in excess of 125 tons) on the following dates

a August 2, 2003 - 134 65 tons

b August 8, 2003 - 162 98 tons

c August 11, 2003 - 150 39 tons

d August 12 2003 - 410 10 tons

e August 14 2003 - 185 3 tons

f August 16, 2003 - 144 42 tons

g August 20, 2003 - 271 90 tons

h August 22, 2003 - 280 37 tons

i August 27, 2003 - 198 33 tons

j August 28, 2003 - 156 74 tons

Exh J-2, ¶27

139 The receipt of solid waste and recyclable materials on the dates cited in the prior paragraph, in excess of 125 tons, violated Magic Disposal's SWF Condition No 13 Exh P-21

140 Between the evening of September 8, 2003 and the morning of September 9, 2003, Magic Disposal stored solid waste overnight on its transfer station tipping floor Exh P-21 (Only 90 cu yds of waste dumped before inspection, 555 cu yds of cardboard and 3555 cu yds of Types 13 and 13C dumped on the pavement outside the transfer station, "waste deposited outside the building blocked the entrance to the tipping floor inside the building as well as the transfer trailer loading area inside the building") Exh P-22A, P-22P, P-22Q (pictures)

141 The overnight storage of solid waste on Magic Disposal's transfer station tipping floor violated SWF Permit Condition No 14 Exh P-21

142 On September 9, 2003, a chain link fence which separated the approved paved area for solid waste from the unpaved, unapproved area on Magic Disposal's property was knocked down by scrap metal (as previously noted in the July 22, 2003 inspection report, Exh P-19) Exh P-21, P-22F, P-22I (pictures).

143 The knocked-down chain link fence violated Magic Disposal's SWF Permit Condition No 22 Exh P-21

144 Due to the failure by Magic Disposal to remove solid waste from its tipping floor on the evening of September 8, 2003, it failed to wash down its transfer station tipping floor Exh P-21

145 The failure by Magic Disposal to wash down its transfer station tipping floor on September 8, 2003 violated Magic Disposal's SWF Permit Condition No 23 Exh P-21

146 As a result of its inspection on September 9, 2003 DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f, 22 and 23 See Exh P-23, Exh J-2, ¶28

October 9, 2003

147 DEP Inspector Ron Feehan inspected Magic Disposal on October 9, 2003 Exh J-2, ¶29

148 On October 9, 2003, Magic Disposal was not using a movable barrier to separate waste from recycling activities inside Magic Disposal's transfer station building Exh J-1, ¶37

149 On October 9, 2003, when Magic Disposal was not using a movable barrier to separate solid waste from recyclable materials, it violated SWF Permit Condition No 15c Exh P-24, Feehan, Tr1@ 45(15-25)

150 On October 9, 2003, a pile of loose cardboard (approx 10' high x 40' wide x 40' long or 592 cu yds) was deposited outside Magic Disposal's transfer station building, and partially covered several bales of cardboard Exh. P-24, P-25B (picture)

151 The pile of loose cardboard deposited outside Magic Disposal's transfer station building violated Magic Disposal's SWF Permit Condition 4 and 15f Exh P-24

152 On October 9, 2003, past Magic Disposal's scale and leading up to the entrance to the transfer station building a pile of ID Type 13 solid waste was deposited outside of Magic Disposal's transfer station building Solid waste was being added to this pile and some of the pile was being loaded, while outside to transfer trailers Exh P-24. P-25B (pictures)

153. On October 9, 2003, Magic Disposal had deposited a new pile of waste ID Type 13/13C, from the Naval Air Force Base, (approx 12' high x 50' wide x 60' long 1333 cu. yds) outside its transfer station building Exh P-24, P-25A, P-25C (pictures)

154 The outdoor storage and handling of waste set forth in the two prior paragraphs violated Magic Disposal's SWF Permit Condition Nos 4, 13 and 15f Exh P-24

155 On October 9, 2003, outside of Magic Disposal's fenced/paved area, Magic Disposal had piles of

a concrete pieces mixed with dirt (approx 6' high x 10' wide x 100' long),
b wood, stumps, tree parts and dirt (approx 6' high x 10' wide x 50' long),
c tires (approx 5' high x 10' wide x 30' long),
d 11 house trailers in various stages of disrepair, and
e Magic also had a full, tarped 100 cubic yard transfer trailer and a 40 cu yd roll off container with debris in it

Exh P-24, P-25C, P-25D (pictures)

156 The waste described in the prior paragraph violated Magic Disposal's SWF Permit, Conditions 4, 13 and 15f Exh P-24

157 Magic Disposal accepted the following amounts of solid waste and recyclable material (in excess of 125 tons) on the following dates

a September 4, 2003 - 132 77 tons

b September 9, 2003 - 127 08 tons

c September 13, 2003 - 348 15 tons

d September 18, 2003 - 146 75 tons

e September 19, 2003 - 157 73 tons

f September 23, 2003 - 394 54 tons

g September 26, 2003 - 167 47 tons
Exh J-2, ¶30

158. The receipt of solid waste and recyclable materials on the dates cited in the prior paragraph, in excess of 125 tons, violated Magic Disposal's SWF Condition No 13 Exh P-24

159 Between the evening of October 8, 2003 and the morning of October 9, 2003, Magic Disposal stored solid waste ID Type 13/13C overnight on its transfer station tipping floor, and this waste had been on the transfer station tipping floor since the prior month's inspection Exh P-24 (only 140 cu yds of waste delivered prior to inspection, 592 cu yds of cardboard and at least 1333 cu yds of waste were dumped outside the transfer station, "waste observed inside the building appeared to be the same waste as observed in last inspection"). P-25A-P25D (pictures)

160 The overnight storage of solid waste on Magic Disposal's transfer station tipping floor violated SWF Permit Condition No 14 Exh P-24

161 Due to the failure by Magic Disposal to remove solid waste from its tipping floor on the evening of October 8, 2003, it also failed to wash down its transfer station tipping floor Exh P-24

162 The failure by Magic Disposal to wash down its transfer station tipping floor on September 8, 2003 violated Magic Disposal's SWF-Permit Condition No 23 Exh P-24

163 On October 9, 2003, Magic Disposal failed to maintain a chain link fence which separated the approved paved area for solid waste from the unpaved, unapproved area on its property Exh P-24

164 The knocked down chain link fence at Magic Disposal violated SWF Permit Condition No 22 Exh P-24

165 As a result of its inspection on October 9, 2003, DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f, 22 and 23 See Exh P-26

October 23, 2003

166 On October 23, 2003, DEP Inspectors Ron Feehan and Bob Harkin inspected Magic Disposal Exh J-2, ¶31

167 On October 23, 2003, solid waste was dumped outside the confines of Magic Disposal's transfer station building Exh J-1. ¶38 See also Exhs P-61C to 61-F (pictures)

168 Magic Disposal violated SWF Permit Condition Nos 4, 13 and 15f when it dumped solid waste outside the confines of its transfer station building on October 23, 2003 Exh P-27, Feehan, Tr1@48(11-25)

169 On October 23, 2003, when DEP inspected it, Magic Disposal was not maintaining a movable barrier in place to separate recycling and solid waste activities Exh J-1, ¶39

170 On October 23, 2003, when Magic Disposal was not using a movable barrier to separate solid waste from recyclable materials, it violated SWF Permit Condition No 15c Exh. P-27, Feehan, Tr1@49(1-9)

171 On October 23, 2003, a pile of loose cardboard was deposited outside Magic Disposal's transfer station building and workers were pulling and sorting cardboard from this pile and then the cardboard was taken inside its building to be baled Exh P-27, Exh P-61A (picture).

172 The pile of loose cardboard outside Magic Disposal's transfer station building violated Magic Disposal's SWF Permit Condition Nos 4 and 15f Exh P-27

173 On October 23, 2003, a chain link fence which separated the approved paved area for solid waste from the unpaved, unapproved area on Magic Disposal's property was knocked down by scrap metal (as previously noted in the July 22, 2003 inspection report, Exh P-19) Exh P-27

174 The knocked-down chain link fence violated Magic Disposal's SWF Permit Condition No 22 Exh P-27

175 On October 23, 2003, in the area outside of Magic Disposal's fenced/paved area, Magic Disposal had piles of

a concrete pieces mixed with dirt (approx 6' high x 10' wide x 100' long),
b wood, stumps, tree parts and dirt (approx 6' high x 10' wide x 50' long), and
c eleven house trailers in various stages of disrepair

Exh P-27

176. The waste described in the prior paragraph violated Magic Disposal's SWF Permit, Conditions 4, 13 and 15f Exh P-27

177 Magic Disposal accepted the following amounts of solid waste and recyclable material (in excess of 125 tons) on the following dates

a October 10, 2003 - 311 6 tons

b October 11, 2003 - 168 36 tons

c October 17, 2003 - 211 33 tons

d October 20, 2003 - 204 12 tons
Exh J-2, ¶32

178 The receipt of solid waste and recyclable materials on the dates cited in the prior paragraph, in excess of 125 tons, violated Magic Disposal's SWF Condition No 13 Exh P-27

179 Between the evening of October 22, 2003 and the morning of October 23, 2003, Magic Disposal stored ID Type 13/13C solid waste overnight on its transfer station tipping floor and the solid waste on the tipping floor was the same as was on Magic Disposal's transfer station tipping floor at the October 9, 2003 inspection Exh P-27 ("Waszen also stated that some of the waste previously stored in the building had been removed "), Exhs P-61E, P-61F

180 The overnight storage of solid waste on Magic Disposal's transfer station tipping floor violated SWF Permit Condition No 14 Exh P-27

181 Due to the failure by Magic Disposal to remove all solid waste from its tipping floor on the evening of October 22, 2003, it also failed to wash down its transfer station tipping floor Exh P-27

182 The failure by Magic Disposal to wash down its transfer station tipping floor on October 22, 2003 violated Magic Disposal's SWF Permit Condition No 23 Exh P-27

183 As a result of its inspection on October 23, 2003, DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f, 22 and 23 See Exh P-28, Exh J-2, ¶33

January 8, 2004

184 On January 8, 2004, DEP Inspector Ron Feehan inspected Magic Disposal Exh J-2, ¶34

185 On January 8, 2004, cardboard was deposited and loaded at Magic Disposal in trailers outside the transfer station building Exh J-1, ¶40

186 On January 8, 2004, when cardboard was deposited and loaded at Magic Disposal in trailers outside the transfer station building, it violated SWF Permit Condition No 15f Exh P-29, Feehan, Tr1@49(10-25)

187 On January 8, 2004, solid waste was dumped outside Magic Disposal's transfer station building in an unapproved area Exh J-1, ¶41

188 The backlog of solid waste caused by the New Years holiday season violated Magic Disposal s SWF Permit Condition 13 Exh J-2, ¶37

189 On January 8. 2004, when Magic Disposal deposited and loaded cardboard in trailers outside the transfer station building (Exh J-1, ¶40) and when solid waste was dumped outside Magic Disposal's transfer station building in an unapproved area (Exh J-1, ¶41), Magic Disposal violated its SWF Permit condition Nos 4 and 15f Exh J-2, ¶35, Feehan, Trl@50(5-15)

190 Due to a backup caused by the New Years holiday season, solid waste had been deposited overnight between January 8, 2004 and January 9. 2004 on Magic Disposal's transfer station tipping floor Exh. J-2, ¶36, 38

191 The overnight storage of solid waste on Magic Disposal's transfer station tipping floor violated Magic Disposal's SWF permit condition No 14 Exh P-29

192 On January 8, 2004, Magic Disposal loaded a 100 cu. yd transfer trailer with ID Type 13 waste outside the transfer station building doorway Exh P-29

193 The outdoor loading of a transfer trailer with Type 13 solid waste violated Magic Disposal's SWF Permit Condition No 15f Exh P-29

194 On January 8, 2004, in the area outside of Magic Disposal's fenced/paved area, Magic Disposal had piles of

a concrete pieces mixed with dirt (in a pile smaller than the prior pile measuring approx 6' high x 10' wide x 100' long), and
b four house trailers in various stages of disrepair
Exh P-29

195 The waste described in the prior paragraph-violated Magic Disposal's SWF Permit, Conditions 4, 13 and 15f Exh P-29

196 Magic Disposal accepted the following amounts of solid waste and recyclable material (in excess of 125 tons) on the following dates

a December 10, 2003 - 140 52 tons .

b December 12, 2003 - 279 87 tons

c December 19, 2003 - 170 29 tons
Exh J-2 ¶39

197 The receipt of solid waste and recyclable materials on the dates cited in the prior paragraph, in excess of 125 tons violated Magic Disposal's SWF Condition No 13 Exh P-29

198 On January 8. 2004, Magic Disposal placed a 40 cu yd compactor box containing bulky waste (ID Type 13) and a 20 cu yd roll off partially filled with bulky waste (ID Type 13) in an area of its transfer station yard designated on its site plan for storage of empty containers Exh P-29

199 The storage of containers with solid waste in an area designated for storage of empty containers violated Magic Disposal's SWF Permit Condition No. 4. Exh P-29

200 On January 8, 2004, solid waste at Magic Disposal was deposited on top of the transfer station floor drain grates which obstructed those drains Exh P-29

201 The obstruction of the floor drains violated Magic Disposal's SWF Permit Condition No 23. Exh P-29

202 As a result of its inspection on January 8, 2004 DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15f, and 23 See Exh P-30, Exh J-2, ¶40

February 27, 2004

203 On February 27, 2004, DEP Inspector Ron Feehan inspected Magic Disposal Exh J-2, ¶41

204 On February 27, 2004, Magic Disposal failed to use a movable barrier to separate solid waste activities from recycling activities inside its transfer station building Exh J-1, ¶42

205 On February 27, 2004, Magic Disposal's failure to use a movable barrier to separate solid waste activities from recycling activities inside its transfer station building violated SWF Permit Condition No 15c Exh P-31, Feehan, Tr@50(16)-51(2)

206 On February 27, 2004, cardboard was deposited and sorted on Magic Disposal's property outside its transfer station building Exh J-1, ¶43

207 On February 27, 2004, when cardboard was deposited and sorted on Magic Disposal's property outside its transfer station building that violated SWF Permit Condition Nos 4 and 15f Exh P-31, Feehan, Tr1@51(3-16)

208 On February 27, 2004, when DEP inspected it, Magic Disposal's transfer station air handler was not in use Exh J-1, ¶44

209 On February 27, 2004, when Magic Disposal's transfer station air handler was not in use, it violated SWF Permit Condition No 26 Exh P-31, Feehan, Tr1@51(20)-52(4)

210 On February 27, 2004, past the scale. Magic Disposal had allowed a pile of bulky wastes (approx 15' high x 45' long x 30' wide) such as construction and demolition waste and furniture and other objects (solid waste ID Types 13 & 13C) to be deposited in its outdoors yard, extending into the entrance of the transfer station building Exh J-2, ¶42

211 The outdoor deposit of C&D waste and furniture violated Magic Disposal's SWF Permit Condition Nos 4, 13, and 15f Exh P-31.

212 On February 27, 2004, Magic Disposal placed a 30 cu yd roll-off container in an area of Magic's property designated on its site plan for empty containers This roll-off contained bulky waste (ID Type 13) Exh P-31.

213 The storage of a container with solid waste in an area designated for empty containers violated Magic Disposal's SWF Permit Condition No 4 Exh P-31

214 On February 27, 2004, in the area outside of Magic Disposal's fenced/paved area, Magic Disposal had piles of

a concrete pieces mixed with dirt (in a pile smaller than the prior pile measuring approx 5' high x 10' wide x 50' long),
b dirt mixed in with a few tree stumps, and
c a 100 cu yd transfer trailer filled with bulky waste
Exh P-31

215 The waste described in the prior paragraph violated Magic Disposal's SWF Permit, Conditions 4, 13 and 15f Exh P-31

216 On February 5, 2004, Magic Disposal received 139 79 tons of solid waste and recyclable material Exh P-31

217 The receipt of solid waste and recyclable materials on February 5, 2004 in excess of 125 tons violated Magic Disposal's SWF Condition No 13 Exh P-31.

218 Between the evening of February 26, 2004 and the morning of February 27, 2004, Magic Disposal stored solid waste overnight on its transfer station tipping floor Exh P-31 (Only one 30 cu yd. load of solid waste was received before Feehan's arrival, but 44 cu yds of cardboard and 77 cu yds of waste were stored outside the transfer station building, but enough waste and cardboard was on the tipping floor that it extended to cover the floor grates leading outdoors)

219 The overnight storage of solid waste on Magic Disposal's transfer station tipping floor violated SWF Permit Condition No 14 Exh P-31

220 On February 27, 2004, during DEP's inspection, solid waste was deposited on top of floor drain grates on Magic Disposal's transfer station tipping floor and that solid waste clogged those drains Exh P-31

221 The obstruction of the floor drain grates violated Magic Disposal's SWF Permit Condition No 23 Exh P-31

222 As a result of its inspection on February 27, 2004, DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f, 23 and 26 See Exh P-32, Exh J-2, ¶44

March 31, 2004

223 On March 31, 2004, DEP Inspector Ron Feehan inspected Magic Disposal Exh P-33

224 On March 31, 2004, Magic Disposal failed to utilize a movable barrier to separate solid waste from recycling activities Exh J-1, ¶ 45

225 On March 31, 2004, when Magic Disposal failed to utilize a movable barrier to separate solid waste from recycling activities, it violated SWF Permit Condition No 15c Exh P-33 Feehan, Tr1@52(5-13)

226 On March 31, 2004, cardboard was deposited on Magic Disposal's property outside its transfer station building Exh J-1, ¶ 46, and the pile was approximately 222 cu yds Exh P-33

227 On March 31, 2004, when Magic Disposal deposited cardboard outside its transfer station building, Magic Disposal violated Conditions 4 and 15f of its SWF Permit Feehan, Tr1@ 66(10-20) This cardboard dumped outside was also manually sorted by Magic Disposal workers and taken inside the transfer station by a front end loader Exh P-33

228 On March 31, 2004, past the scale, Magic Disposal had deposited outside the transfer station doors a pile of bulky wastes such as construction and demolition waste and furniture (ID Type 13/13C) and dry ID 10 waste such as plastic (approx 12' high x 50' long x 30' wide 400 cu, yds) Magic Disposal had positioned equipment to load a transfer trailer with this waste, outside of the transfer station Exh P-33

229 The deposit and handling of solid waste outside the transfer station doors violated Magic Disposal's SWF Permit Condition Nos 4, 13 and 15f Exh P-33

230 On March 31, 2004, in Magic Disposal's outside yard area designated for empty container storage, Magic Disposal stored a 30 cu yd roll-off container with mattresses, wood and plastic (ID Type 13), and a pile of aluminum (approx 5' high x 12' wide x 10' long) Exh P-33

231 The outdoor storage of waste and aluminum in the area designated for empty containers violated Magic Disposal's SWF Permit Condition No 4 Exh P-33

232 On March 31, 2004, in the area for empty containers, Magic Disposal stored a 30 cubic yard container with mattresses, wood and plastic and a pile of metal salvage (approx 5' high x 12' wide x 10' long) Exh P-33

233 The pile of metal salvage and the 30 yd container with C&D waste violated Magic Disposal's SWF Permit Condition No 4 Exh P-33

234 On March 31, 2004, in the area outside of Magic Disposal's fenced/paved area, Magic Disposal had piles of

a concrete pieces mixed with dirt (approx 4 5' high x 5' wide x 40' long),
b dirt mixed in with debris (3 piles),
c tires (approximately 3' high x 10' wide x 10' long),
d a 100 cu yd transfer trailer full of ID Type 13 waste (tarped)
e a 100 cu yd transfer trailer half-filled with ID Type 10 & 13 waste (untarped), and
f and one 100 cu yd transfer trailer full of ID Types 10 and 13 solid waste
Exh P-33

235 The waste described in the prior paragraph (and located outside of Magic Disposal's fenced/paved area) violated Magic Disposal's SWF Permit, Conditions 4 and 13 Exh P-33

236 Magic Disposal received solid waste and recyclable material at its transfer station in the following amounts (in excess of 125 tons) on the following dates

a March 4, 2004 147 68 tons,

b March 8, 2004 139 49 tons,

c March 15, 2004 165 11 tons,

d March 17, 2004 144 16 tons,

e March 24, 2004 127 50 tons,

f March 26, 2004 143 71 tons,
Exh P-33

237 The receipt of solid waste and recyclable materials on the dates cited in the prior paragraph, in excess of 125 tons, violated Magic Disposal's SWF Condition No 13. Exh P-33

238 On March 31, 2004, Magic Disposal deposited solid waste on top of floor drain grates on its transfer station tipping floor which clogged its drains Exh P-33

239 The waste deposited on Magic Disposal's drain grates violated Magic Disposal's SWF Permit Condition No 23 Exh P-33

240 On March 31, 2004, when DEP was inspecting Magic Disposal, Magic Disposal turned off its air handler while solid waste processing activities were occurring in the transfer station building Exh P-33

241 The turned off air handler violated Magic Disposal's SWF Permit Condition No 26 Exh P-33

242 Magic Disposal stored solid waste on its transfer station tipping floor overnight between the night of March 30, 2004 and the morning of March 31 2004 Exh

P-33 (Only 30 cu yds of waste had arrived before Feehan's inspection but 222 cu yds of cardboard and 666 cu yds of waste were stored outside the transfer station, with the solid waste extending "into the entrance to the tipping floor" Waszen referred to the pile of waste outside the building as "Mount Magic' There were 222 cu feet of cardboard and 400 cu yds of waste on the tipping floor during the inspection)

243 The overnight storage of solid waste by Magic Disposal on its transfer station tipping floor violated Condition 14 of Magic Disposal's SWF Permit Exh P-33

244 As a result of its inspection on March 31, 2004, DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f, 23 and 26 See Exh P-34

May 5 2004

245 On May 5, 2004, DEP Inspector Ron Feehan inspected Magic Disposal Exh P-35

246 On May 5, 2004, Magic Disposal failed to use a movable barrier to separate recycling activities from solid waste operations Exh J-1, ¶47

247 On May 5, 2004, when Magic Disposal failed to use a movable barrier to separate recycling activities from solid waste operations, it violated SWF Permit Condition No 15c Exh P-35, Feehan, Tr1@ 71(12-19)

248 On May 5, 2004, Magic Disposal failed to use its air handler while processing cardboard at its baler Exh J-1, ¶48

249 On May 5, 2004, when Magic Disposal failed to use its air handler while processing cardboard at its baler, it violated SWF Permit Condition No 26 Exh P-35, Feehan, Tr1@ 72(16-21)

250 On May 5, 2004, a pile of cardboard (approx 10' high x 40' wide x 35' long, 518 cu yds) was dumped outside of Magic Disposal's transfer station building and was being taken inside the transfer station building via a loader and placed in the baler unit Exhs P-35, P-37

251 The outdoor dumping of cardboard by Magic Disposal and transfer of it indoors violated Magic Disposal's SWF Permit Condition Nos 4 and 15f Exh P-35

252 On May 5, 2004, a Magic Disposal roll-off truck dumped cardboard onto the ground outside of Magic Disposal's transfer station building (and onto the pile referenced two paragraphs above) Exhs P-35, P-37

253 The outdoor dumping of cardboard violated Magic Disposal's SWF Permit Condition Nos 4 and 15f Exh P-35

254 On May 5, 2004, outdoors past the scale, Magic Disposal had a pile of ID Type 13 waste (C&D waste, furniture and mattresses) and dry ID 10 waste (e g plastic, bagged waste) outside its transfer station building (approx 15' high x 120' long x 75' wide) which extended to the entrance of the transfer station building Exhs P-35 P-37

255 The outdoor storage of ID Type 10 and 13 waste violated Magic Disposal's SWF Permit Condition Nos 4, 13 and 15f Exh P-35

256 On May 5, 2004, near the pile referenced two paragraphs above, Magic Disposal had a second pile of ID Type 13 waste (C&D waste furniture and mattresses) and dry ID 10 waste (e g plastic bagged waste) outside its transfer station building (approx 12' high x 35' long x 25' wide) Exhs P-35, P37

257 The outdoor storage of ID Type 10 and 13 waste violated Magic Disposal's SWF Permit Condition Nos 4, 13 and 15f Exh P-35

258 On May 5, 2004, in the area designated in Magic Disposal's site plan for storage of empty containers, Magic Disposal had 11 bales of soiled cardboard mixed with bags of trash and a pile of aluminum (approx 6' high x 25' long x 10' wide) Exhs P-35, P-37

259 The 11 bales of materials stored in the area designated for empty containers violated Magic Disposal's SWF Condition Nos 4 and 15f Exh P-35

260 On May 5, 2004, in the area outside of Magic Disposal's fenced/paved area, Magic Disposal had piles of

a a small pile of concrete mixed with dirt,
b dirt mixed in with debris (3 piles),
c one house trailer,
d tires (approximately 3' high x 10' wide x 10' long) and
e a large pile of metal (20' high x 30' wide x 25' long) (in the southwest corner of the property, along Jefferson Avenue)

Exhs P-35, P-37

261 The waste described in the prior paragraph (and located outside of Magic Disposal's fenced/paved area) violated Magic Disposal's SWF Permit, Conditions 4 and 13 Exh P-35

262 Magic Disposal received solid waste and recyclable material at its transfer station in the following amounts (in excess of 125 tons) on the following dates

a April 6, 2004 137 18 tons,

b April 12, 2004 135 26 tons,

c April 21, 2004 132 84 tons

Exh P-35, P-37

263 The receipt of solid waste and recyclable materials on the dates cited in the prior paragraph, in excess of 125 tons, violated Magic Disposal's SWF Condition No 13 Exh P-35

264 Magic Disposal stored solid waste on its transfer station tipping floor overnight between the night of May 4, 2004 and the morning of May 5, 2004 Exhs P-35 (140 cu yds of waste were delivered prior to DEP s inspection, but 600 cu yds of waste was inside the transfer station The waste spanned the width of the building 518 cu yds of cardboard and 5388 cu yds of waste – in 2 separate piles – were dumped outside and not being loaded One pile of outside waste extended into the entrance to the tipping floor and blocked access to the transfer station building 11 bales of solid waste were deposited outside), P37 (Magic acknowledged the violations)

265 The overnight storage of solid waste by Magic Disposal on its transfer station tipping floor violated Condition 14 of Magic Disposal's SWF Permit Exh P-35

266 On May 5, 2004, solid waste was deposited on top of floor drain grates on Magic Disposal's transfer station tipping floor, which obstructed the drain grates Exhs P-35, P-37

267 The waste deposited on Magic Disposal's drain grates violated Magic Disposal's SWF Permit Condition No 23 Exh P-35

268 As a result of its inspection on May 5, 2004, DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f, 23 and 26 See Exh P-36

June 23, 2004

269 On June 23, 2004, DEP Inspector Ron Feehan inspected Magic Disposal Exh P-38

270 On June 23, 2004, transfer/dumping activity was conducted on Magic Disposal's property outside the confines of its transfer station building Exh J-1, ¶49 See also, Exhs P-39A-39G, 39I, 39K,39L (pictures)

271 On June 23, 2004, when transfer/dumping activity was conducted on Magic Disposal's property outside the confines of its transfer station building, Magic Disposal violated SWF Permit Condition No 13 Exh P-38 , Feehan, Tr1@ 72(22)-73(7)

272 On June 23, 2004, when Magic Disposal engaged in transfer/dumping activity outside the confines of its transfer station building (Exh J-1, ¶49), it violated SWF Permit condition Nos 4 and 15f Exh P-38

273 On June 23, 2004, Magic Disposal failed to use a movable barrier to separate recycling activities from its solid waste operations Exh J-1, ¶50

274 On June 23, 2004, when Magic Disposal failed to use a movable barrier to separate recycling activities from its solid waste operations, it violated SWF Permit Condition No 15c Exh P-38, Feehan, Tr1@ 73(8-18)

275 On June 23, 2004, adjacent to the scale and outside Magic Disposal's transfer station building, Magic Disposal had a pile of ID Type 13 waste (C&D waste, furniture and mattresses) mixed with dry ID 10 waste (e g plastic, bagged waste) (approx 18' high x 50' wide x 85' long) Exhs P-38, P-39A, P-39D, P-39F, P-39I (pictures)

276 On June 23, 2004, a second pile of similar waste was deposited outside Magic Disposal's transfer station building (approx 18' high x 35' wide x 100' long) Exhs P-38, P-39B-39F, P-39K (pictures)

277 The outdoor storage of two piles of ID Type 10 and 13 waste violated Magic Disposal's SWF Permit Condition Nos 4, 13 and 15f Exh P-38

278 On June 23, 2004, in the outdoors area designated in Magic Disposal's site plan for storage of empty containers and along a fence, Magic Disposal stored 7 bales of solid waste Exhs P-38, P39L (pictures)

279 On June 23, 2004, in the outdoors area designated in Magic Disposal's site plan for storage of empty containers and next to the 7 bales of solid cardboard, Magic Disposal stored a small pile of metal Exhs P-38, P-39L (picture)

280 The 7 bales of waste and the small pile of metal stored in the area for storage of empty containers violated Magic Disposal's SWF Condition Nos 4 and 15f Exh P-38

281 On June 23, 2004, Magic Disposal stored approximately 22 bales of solid waste outside its transfer station building between a wooden fence and bales of cardboard Exhs P-38, P-39L (picture).

282 The outdoor storage of 22 bales of solid waste violated Magic Disposal's SWF Permit Condition Nos 4, 13 and 15f Exh P-38

283 On June 23, 2004, in the area past the fence and approved paved facility footprint area, Magic Disposal stored

a a small pile of concrete mixed with dirt,
b a pile of dirt mixed in with debris,
c a small pile of tires (approximately 3' high x 10' wide x 25' long), and
d a pile of metal (8' high x 20' wide x 20' long) (near the outside fence in the southwest corner of the property, along Jefferson Avenue) (which had come from a job at the Ocean One site in Atlantic City)

Exhs P-38 P-39C, P-39B, P-39L (pictures)

284 The waste described in the prior paragraph (and located outside of Magic Disposal's fenced/paved area) violated Magic Disposal's SWF Permit, Conditions 4 and 13 Exh P-38

285 During DEP's inspection on June 23, 2004, some of the metal located outside the paved facility footprint, along the fence in the southwest corner of Magic Disposal, was being loaded into a trailer from Central Jersey Wrecking Exh P-38

286 The outdoor loading of metal into the Central Jersey Wrecking trailer violated Magic Disposal's SWF Permit Condition Nos 4 and 15f Exh P-38

287 On June 23, 2004, in the area past the fence and approved paved facility footprint area, Magic Disposal had stored

a one 30 cu yd full, tarped roll-off container loaded with waste,
b one 100 cu yd loaded and tarped transfer trailer containing bulky waste (ID Type 13), and

c a partially full, tarped 100 cu yd transfer trailer containing bulky waste (ID Type 13)

Exhs P-38, P-39C (pictures)

288 The outdoor storage of waste in the roll-off container and transfer trailers referenced in the prior paragraph violated Magic Disposal's SWF permit condition Nos 4 and 13 Exh P-38

289 On May 3, 2004, Magic Disposal received 142 47 tons of solid waste and recyclable material at its transfer station Exh P-38

290 The receipt of solid waste and recyclable materials on May 3, 2004, in excess of 125 tons, violated Magic Disposal's SWF Condition No 13 Exh P-38

291 Magic Disposal stored solid waste on its transfer station tipping floor overnight between the night of June 22, 2004 and the morning of June 23, 2004 Exhs P-38 ("Waszen stated a letter was going to be sent to Supervisor Ferraro detailing reasons why attempts to clean up the wastes at the transfer station were unsuccessful" "Waszen stated he is beginning to try to ship out stockpiled wastes to catch up" Only 60 cu yds of waste had been received prior to DEP's inspection, but 88 cu yds of cardboard and 5166 cu yds of waste were stored outside and 444 cu yds of cardboard and 22 cu yds of waste were stored on the tipping floor There was also a 10' high pile of commercial waste from the trailer loading area to the next portion of the building), P-39A, P-39C to P-39I, P-39K (pictures)

292 The overnight storage of solid waste by Magic Disposal on its transfer station tipping floor violated Condition 14 of Magic Disposal's SWF Permit Exh P-38

293 On June 23, 2004, solid waste and newsprint was deposited on top of floor drain grates on Magic Disposal's transfer station tipping floor (on the recycling side of the building), which obstructed the drain grates Exhs P-38, P-39G, P-39K (pictures)

294 The waste and newsprint deposited on Magic Disposal's drain grates violated Magic Disposal's SWF Permit Condition No 23 Exh P-38

295 As a result of its inspection on June 23 2004, DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, 15f and 23 See Exh P-40

July 30, 2004

296 On July 30 2004, DEP Inspector Ron Feehan inspected Magic Disposal Exh P-41

297 On July 30, 2004, Magic Disposal failed to use a moveable barrier to separate solid waste operations from recycling activities Exh J-1, ¶51

298 On July 30, 2004, when Magic Disposal failed to use a moveable barrier to separate solid waste operations from recycling activities, it violated SWF Permit Condition No 15c Exh P-41, Feehan, Tr1@73(19)-74(4)

299 On July 30, 2004 a pile of loose cardboard (approx 6' high x 40' wide x 20' long, 177 cu yds) was dumped outside Magic Disposal's transfer station building Workers at Magic Disposal were taking cardboard inside to be baled and the workers were also sorting out the cardboard Exh P-41

300 The pile of loose cardboard deposited outside Magic Disposal's transfer station building, and being prepared for baling, violated Magic Disposal's SWF Permit Condition Nos 4 and 15f Exh P-41

301 On June 23, 2004, adjacent to the scale and outside Magic Disposal's transfer station building, Magic Disposal had a pile of ID Type 13 waste (C&D waste, furniture and metal) mixed with dry ID 10 waste (e g plastic, soiled cardboard and paper)(approx 12' high x 45' wide x 55' long) Magic disposal was using a front end loader to load solid waste from this pile into a 100 cu yd transfer trailer Exh P-41

302 The pile of ID Type 13 and 10 solid wastes outdoors at Magic Disposal, adjacent to the scale, and the loading of it into a transfer trailer violated Magic Disposal's SWF Permit Condition Nos 4, 13 and 15f Exh P-41

303 On July 30, 2004, a second pile of waste similar to that referenced two paragraphs above (approx 10' high x 20' wide x 40' long) was deposited outside Magic Disposal's transfer station building Exh P-41

304 The outdoor storage of this second pile of ID Type 10 and 13 waste violated Magic Disposal's SWF Permit Condition Nos 4, 13 and 15f Exh P-41

305 On June 30, 2004, outside of Magic Disposal's transfer station, between the wooden fence and bales of cardboard, Magic Disposal stored bales of solid waste, to which Magic Disposal added additional bales during the course of DEP's inspection Exh P-41

306 The outdoor storage and depositing of bales of solid waste violated Magic Disposal's SWF Permit Condition Nos 4, 13 and 15f Exh P-41

307 On July 30, 2004, in the area past the fence and approved paved facility footprint, Magic Disposal had stored

a 12 bales of waste,
b crushed pallets,
c box trailers, and
d four 100 cu yd Magic Disposal transfer trailers loaded with bulky waste Exh P-41

308 The waste described in the prior paragraph (and located outside of Magic Disposal's fenced/paved area) violated Magic Disposal's SWF Permit, Conditions 4 and 13 Exh P-41

309 Magic Disposal stored solid waste on its transfer station tipping floor overnight between the night of July 29, 2004 and the morning of July 30 2004 Exh P-41 (No loads of waste arrived before DEP's inspection and no trailer were waiting to be loaded, but only "some of the ID 13 from this section of the building has been removed since my last inspection " 177 cu yds of cardboard and 1196 cu yds of waste were dumped outside the transfer station)

310 The overnight storage of solid waste by Magic Disposal on its transfer station tipping floor violated Condition 14 of Magic Disposal's SWF Permit Exh P-41

311 On July 30, 2004, solid waste clogged floor drain grates on Magic Disposal's transfer station tipping floor, which obstructed the drains Exh P-41

312 The clogged drains at Magic Disposal violated its SWF Permit Condition No 23 Exh P-41

313 As a result of its inspection on July 30, 2004, DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13 14, 15c, 15f and 23 See Exh P-42

September 15, 2004

314 On September 15, 2004, DEP conducted an inspection of Magic Disposal Exh P-43

315 On September 15, 2004, Magic Disposal did not have a moveable barrier present to separate recyclable materials from solid waste Exh J-1, ¶52

316 On September 15 2004, when Magic Disposal failed to use a moveable barrier to separate solid waste operations from recycling activities, it violated SWF Permit Condition No 15c Exh P-43, Feehan, Tr1@74(5-15)

317 On September 15, 2004 in the area past the fence and approved paved facility footprint, Magic Disposal stored a small pile of scrapings from waste mixed with dirt scrapings Exh P-43

318 The waste described in the prior paragraph (and located outside of Magic Disposal's fenced/paved area) violated Magic Disposal's SWF Permit Conditions 4 and 13 Exh P-43

319 As a result of its inspection on September 15, 2004, DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13 and 15c See Exh P-45

December 8, 2004

320 On December 8, 2004, DEP Inspector Ron Feehan inspected Magic Disposal Exh P-46

321 On December 8, 2004, Magic Disposal had a pile of waste (approx 7' high x 10' wide x 25' long) on its transfer station tipping floor, which Steve Waszen said had been stored on the tipping floor since 5 00 pm the prior evening Exh P-46

322 The overnight storage of solid waste on Magic Disposal's transfer station tipping floor violated SWF Permit Condition No 14 Exh P-46

323 In light of the overnight storage of waste on Magic Disposal's transfer station tipping floor, Magic Disposal was not in a position to clean its tipping floor during the 24 hour period prior to the December 8, 2004 inspection Exh P-46

324 The failure by Magic Disposal to clean its tipping floor violated Magic Disposal's SWF permit Condition 23 Exh P-46

325 On December 8, 2004, Magic Disposal's transfer station tipping floor drains were clogged with solid waste and liquids had ponded on the floor Exh P-46

326 The clogged drains on Magic Disposal's transfer station tipping floor violated Magic Disposal's SWF permit Condition 23 Exh P-46

327 On December 8, 2004, there was no moveable barrier separating Magic Disposal's solid waste from its recyclable operations Exh P-46

328 The failure to have a barrier separating Magic Disposal's solid waste and recycling activities violated Magic Disposal's SWF permit Condition 15c Exh P-46

329 On December 8, 2004, Magic Disposal had installed a new baler in an addition to its transfer station building without approval from DEP Exh P-46

330 The failure by Magic Disposal to obtain DEP approval prior to installing a new baler and constructing an addition to its building violated Magic Disposal's SWF Permit Condition Nos 4 and 13 Exh P-46

331 As a result of its inspection on December 8, 2004, DEP issued a Notice of Violation to Magic Disposal for violations of SWF Permit Condition Nos 4, 13, 14, 15c, and 23 See Exh P-47

D Penalty Calculation, Matrix & Base Penalties

332 DEP relied upon Solid Waste Bureau Chief Rai Belonzi to describe how Magic Disposal's penalty was calculated Belonzi, Tr5@19(8)-20(2) Belonzi reviewed Feehan's inspection reports before determining a penalty and recommending the issuance of the AO/NOCAPA to DEP's solid waste director at that time, Wolfgang Skacel Belonzi, Tr5@17(15-25)

333 DEP calculated the penalty based on the 20 separate days of violations observed during Feehan's inspections DEP assessed an aggregate penalty for each of those 20 days Although the inspector found multiple violations on each date of inspection, DEP put them all together as one daily violation for penalty calculation purposes, instead of assessing each violation singly and individually Belonzi, Tr5@19(12)-20(2)

334 DEP had the discretion to penalize Magic for each separate permit violation, including each separate date on which Magic received excess tonnage Belonzi, Tr5@20(3-11), N J A C 7 26-5 5(b), (c) and (e)

335 DEP relied on the penalty matrix at N J A C 7 26-5 5 to calculate the penalty The penalty matrix is set up like a tic-tac-toe board to match up a violator's conduct with the seriousness of the violation Belonzi, Tr5@20(12) - 21(18) DEP believed Magic's conduct was major and its violations were serious, thus requiring a $35,000 penalty under the penalty matrix at N J A C 7 26-5 5 Belonzi Tr5@23(23(8)-25(9) 90(14-21)

336 DFP did not assess the penalty as a "base" penalty pursuant to N J A C 7 26-5 4, because base penalty violations are usually reserved for first time offenders with otherwise responsible track-records Belonzi, Tr5@120(7-25) Instead, the matrix is used when a the penalty amount under N J A C 7 26-5 4 would be too low to provide a deterrent

E Deterrence

337 In considering whether a penalty would have a deterrent effect, DEP took into account

a the fact that Magic Disposal still operates in the solid waste business as a hauler, Belonzi, Tr5@81(11)-82(14),
b Magic had a history of ignoring court orders and prior, lower penalties, Belonzi, Tr5@ 80(11-22),
c the small size of the solid waste industry and the need to send a message to the industry as a whole, Belonzi, Tr5@78(20)-80(5), and
d The removal of any financial benefit to Magic Disposal from non-compliance with its permit, such as recovering excess materials from solid waste loads and reducing the disposal cost of the remaining waste and reducing the amount of waste that Magic had to pay Atlantic County for waste never taken there Belonzi, Tr5@86(4) - 88(4)

338 Waszen confirmed that some of Magic's violations resulted from putting its business interests first Waszen, Tr7@85(25), 201(22)-202(11)

339 Despite the denial of Magic Disposal's SWF permit renewal on January 27, 2005, Exh J-1, ¶6, Magic Disposal thereafter continued to operate and it took an order by Superior Court Judge William Todd on June 7, 2005 to shut Magic down Exhs P-68, 68A

F Penalty - Moderate Seriousness

340 DEP calculated Magic's penalty on the belief that Magic Disposal's violations were moderately serious, which means a violation which

I Has caused or has the potential to cause substantial harm to human health or the environment, or

II Substantially deviates from the requirements of the Act or any rule promulgated, any permit, license or other operating authority issued pursuant to the Act, substantial deviation shall include, but not be limited to, violations which are in substantial contravention of the requirements or which substantially impair or undermine the operation or intent of the requirement, [N J A C 7 26-5 5(g)2]

341 DEP determined, for penalty calculations purposes, that Magic's violations had the potential to cause substantial harm to human health or the environment and substantially deviated from the requirements of Magic's permit Belonzi, Tr5@40(19-25), 41(14-22)

342 Magic was one of the worst transfer stations Feehan had ever inspected in his 25 years with DEP Feehan, June 5 2007, Exh P-68A, p 11

343 Magic's failure to use its air pollution control device during operating hours had the potential for substantial harm to human health and the environmental by failing to stop fugitive emissions or particulates from leaving the facility and being deposited outdoors where they could be washed into an unpaved surface Belonzi, Tr5@47(2)-48(18)

344 Magic's failure to keep its drain unobstructed presented the potential to cause substantial harm to human health or the environment because a clogged drain would allow for a ponding of water in the facility or water could be tracked on vehicle tires out into the yard Then it could be washed onto unpaved surfaces or tracked onto roadways Additionally, obstructed drains could result in the development of a drinking supply for rats or other vectors Obstructed drains also could result in risk of slip and fall conditions, thereby increasing health risks to workers' inside the facility Belonzi Tr5@48(19) -49(2, 50(4)-51(2))

345 Magic's failure to remove waste from the facility in a timely manner posed a significant fire threat because stockpiled immobile combustibles have a potential for fire Belonzi, Tr5@51(3)- 52(4) Waszen confirmed this when he explained why Magic would not store waste from the Borgata Casino indoors Waszen, Tr7@191(19) - 192(7), 196(4)-197(21)

346 Magic's failure to clear or clean its floors every 24 hours, or to remove waste from its transfer station overnight, had the potential for substantial harm to human health and the environmental because it could allow the harborage of vectors or varmints, and fires can happen because of the residual build up of heat depending on the type of material that is allowed to remain Belonzi, Tr5@51(25)-52(8)

347 Waste stored overnight or for multiple nights is a potential attractant, or food source, for rats or other vectors Belonzi, Tr5@ 52(5) - 55(24)

348 For penalty purposes DEP also took into account Magic's substantial deviation from its permit, both for each individual violation and collectively for each day's and all days' repetitive violations Belonzi, Tr5@ 56(10)-57(11), 77(16) - 78(11)

349 Permits are the cornerstone of the enforcement process Belonzi, Tr5@15(12-16)

350 Magic substantially deviated from the clear requirement of Condition 26 of its SWF permit by operating its air control equipment while workers were processing waste inside Belonzi, Tr5@ 57(12-25)

351 Magic substantially deviated from the clear requirement of Condition 14 of its permit by storing waste overnight, especially where this was repeated in almost all 20 inspection, Belonzi, Tr5@ 58(1-24), and sometimes stored it for several weeks in a row See e g , October 9 and 23, 2003 Inspection Reports (Exhs P-24, P-27)

352 Magic substantially deviated from the clear requirement of Condition 13 of its permit by accepting more than 125 tons of solid waste and recyclables on about 63 different occasions, sometimes exceeding the requirement by multiples of two or three Belonzi, Tr5@ 58(22) - 59(15) See e g . Exh J-2, ¶¶8, 11, 15, 21, 27, 30, 32, and 39 Moreover, when receiving excess solid waste and recyclables, a substantial deviation from the permit occurs because the operator veers into areas of potential unsafe operation by exceeding the design parameters of the structure Belonzi, Tr5@59(18-25)

353 Magic substantially deviated from the clear requirement of Condition23 of its permit by failing to clean its tipping floor every night during the course of the three years of inspections Belonzi, Tr5@ 60(13) - 61(1) This deviation from the permit requirements could also lead to the creation of leachate -- liquid leaking from solid waste -- which could be tracked into the building or into the paved yard or street Leachate could serve as a food source for rodents and the leachate could also render the value of cardboard diminished or negated Belonzi, Tr5@61(2-11)

354 Magic substantially deviated from the express requirements of Condition 4, 13 and 15f of its permit by dumping and processing waste on the unpaved portions of the transfer station property, because there were no environmental controls to assess the effect of waste on the ground below, there was no air pollution control system in place, no dust control system or leachate control Belonzi, Tr5@61(12)-62(21) Magic was supposed to handle solid waste inside the station according to the site plan Belonzi, Tr5@62(22)-(25)

355 Handling material in a location other than where the site plan allowed it substantially and directly contravened Magic s permit requirements, Nos 4 & 15f Belonzi, Tr5@ 63(1-8)

356 Magic substantially deviated from the requirements of Condition 4 and 15f of its permit by dumping/processing recyclable materials outside the transfer station building Belonzi, Tr5@63(9-24) The respondent knew that its permit required it to handle cardboard indoors Waszen, Tr7@125(15-19), Norman, Tr5@26(24)-27(3) The necessary environ-mental controls were not in the yard and the yard was not designed or intended for processing material or its stockpiling Belonzi, Tr5@64(18)-65(a) Instead, the structure was designed for waste processing inside and for the structure's floors to be cleaned every 24 hours Belonzi, Tr5@63(25)-64(7)

357 Magic substantially deviated from the express requirements of Condition 22 of its permit by allowing a knocked down fence to remain unrepaired or unreplaced Belonzi, Tr5@ 65(10-19) The deviation was substantial because it changed the basis on which the site plan was reviewed and the permit issued Belonzi, Tr5@65(20)-66(4)

358 Magic substantially deviated from the express requirements of Condition 26 of its permit by allowing its to become obstructed, Belonzi, Tr5@ 67(2-21), because the drains were present to remove waste water or liquid tracked in Obstructed

drains allow the water to become entrained in (or soaked up by) the waste or the recyclables process, thus increasing the weight of the solid waste and reducing the value of recyclable material Once entrained, it could also be tracked outside the building onto a paved or unpaved surface where it could enter the ground Belonzi, Tr5@67(22)-68(23)

359. Magic substantially deviated from the express requirements of Condition 16 of its permit by allowing unregistered solid waste vehicles on site, Belonzi, Tr5@68(24)-69(9), 73(4-10) because Magic's permit only allowed registered solid waste vehicles to deliver and deposit waste Belonzi, Tr5@74(17-75) (17) A registration decal goes onto a vehicle or container before it is put into service so DEP can differentiate what type of material is being transported Belonzi, Tr5@75(3-17)

360 If a vehicle is not registered or decaled, it hampers the DEP's ability to check on them, since it lacks police powers The Department has to follow the truck to its destination and only when it stops, ask the driver for permission to see inside The requirement is to know where containers are, what they are for, and then the sites need to address how they handle those containers Belonzi, Tr5@ 75(18)-76(6)

361 Magic substantially, and in fact completely, deviated from the express requirements of Condition 15c of its permit by never having movable barriers to separate solid waste from recyclable material Belonzi, Tr5@76(7-22) The barrier is necessary to separate relatively clean recyclables from relatively dirty waste Without the barrier, waste becomes commingled with recyclables, thus diminishing the value of recyclable material and DEP encourages the recycling of materials, and the absence of this barrier interferes with Magic's ability to meet the goal set by the DEP to recycle materials, as opposed to landfill them Belonzi, Tr5@76(23)-77(15)

G Penalty - Major Conduct

362 DEP determined, for penalty purposes, that Magic's conduct was "major," which is defined as "any intentional, deliberate, purposeful, knowing or willful act or omission by the violator," N J A C 7 26-5 5(h)1 Belonzi, Tr5@24(10-16) DEP reached this conclusion based on the numerous NOVs issued to Magic by Inspector Feehan, and numerous court orders or AO/NOCAPAs issued to Magic over the five years prior to the AO/NOCAPA, which Magic defied by virtue of its continued permit violations Tr5@ 24(17)- 25(9), 38(2-12)

363 DEP issued a final order on June 17 2000 that Magic violated its permit condition limiting its daily tonnage intake to a maximum of 125 tons/day during October, November and December 1999 and January and February 2000, and ordered Magic to cease exceeding the tonnage limit set forth in the permit issued August 13, 1998 (i e the permit which is the subject of the current AO/NOCAPA) Exhs P-53, P-54 Belonzi, Tr5@26(24) - 27(16)

364 On August 2, 2001, the Hon George Seltzer, P J Ch , ordered Magic to implement an effective rodent control program, ordered Magic not to leave solid waste on its floor overnight, cease and desist storing cardboard and waste materials in open piles around its facilities, and store recyclable materials and waste in accord with its permit Exh P-55, Belonzi Tr5@27(18)--28(1), 30(20-24)

365 On October 31, 2001, the Hon George Seltzer, P J Ch , adopted as a final Superior Court judgment the order in DEP's AO/NOCAPA SW-07257 (i e Exh P-53), and ordered Magic Disposal and Steve Waszen to comply with all provisions of the Final Administrative Order entered in DEP Docket No SW07257 He also entered a judgment for $78,000 for violations of the Solid Waste Management Act Exh P-49, Belonzi, Tr5@ 31(17) - 32(10)

366 On January 23, 2002, just before Feehan's first inspection alleged in the current AO/NOCAPA, the Hon George Seltzer, P J Ch , issued a Superior Court order to Magic Disposal, in relevant part, as follows

a Air pollution control equipment within the transfer station shall be kept in good repair and fully operable,

b Floor drain(s) and other components of the defendant's water pollution control improvements shall be cleaned and restored to a fully operational condition ,

c An effective rodent control program shall be implemented,

d Cardboard, solid wastes and other piles of materials that have been deposited or stockpiled by the defendant around the facility shall be removed and disposed of in accordance with the Solid Waste Management Act

e Acceptance, storage, handling and shipments of waste materials and recyclable materials at the Ridge Avenue site shall be in accordance with the Defendant's NJDEP Facility Permit (which shall be deemed incorporated herein by reference)'

f The tipping floor shall be free of waste material at the end of each work day and no solid waste shall be allowed to remain on the tip floor of the Defendant's facility overnight between the hours of 10 00 p m and 7 00 a m ,

g Magic shall cease and desist storage or cardboard and other wastes in open piles in and around its facility

h Rodent control odor control, air quality equipment and water quality improvements, shall be maintained in full operation and effect

i In coming loads of waste materials shall not be dumped on the grounds around the transfer facility All incoming loads of wastes (regardless of NJDEP Type of components) shall be dumped and processed within the transfer station

j The facility shall cease acceptance of wastes, and in-coming loads shall be redirected to other facilities or disposal sites, at any time when the amount of wastes and materials on the site shall exceed the daily permitted capacity

Exh P-50. Belonzi, Tr5@35(10)-36(19)

367 On May 14, 2002, Magic Disposal agreed to a settlement of another AO/NOCAPA (No SW-070005-SW) for payment of $79,000 in penalties (assessed above) and another $20,000 in penalties, plus Magic agreed to comply with its permit not accept waste in excess of its permitted capacity and maintain floor drains Exh P-48, Belonzi, Tr5@34(7-14) This settlement/order was entered while the violations which were the subject of the current AO/NOCAPA were occurring Belonzi, Tr5@35(5-9)

368 On December 17, 2003 -- about 2/3rds of the way through the time of the violations in the current AO/NOCAPA -- the Hon George Seltzer entered a fourth order, imposing $280,000 in penalties and ordering that, "[p]iles of construction and demolition debris, cardboard and other solid waste materials that have been stock piled upon the property shall be immediately removed" from Magic's property Exh P-56, Belonzi, Tr5@ 36(22) - 37(9)

369 During the summer of 2004, while numerous violations in this case continued, on July 27, 2004, the Hon George Seltzer issued a fifth Superior Court order, directing Magic Disposal, Inc., to remove any and all solid waste materials, including but not limited to cardboard, paper, demolition debris, junk vehicles and other similar materials from the grounds surrounding the Defendant's Ridge Avenue facility He further restrained and enjoined Magic from dumping, storing or otherwise processing solid wastes and recyclable materials in open piles upon the grounds surrounding the Magic's Ridge Avenue facility Exh P-57, Belonzi Tr5@37(10) - 38(1)

CONCLUSIONS OF LAW

In 1970, New Jersey's Legislature enacted the Solid Waste Management Act (Act) N J S A 13 1E-1 et seq., based on the finding

> that the collection, disposal and utilization of solid waste is a matter of grave concern to all citizens and is an activity thoroughly affected with the public interest, that the health, safety and welfare of the people of this State require efficient and reasonable solid waste collection and disposal service or efficient utilization of such waste [N J S A 13 1E-2]

Pursuant to Act the Legislature requires solid waste facilities which seek to operate a transfer station to file a registration statement and an engineering design N J S A 13 1E-5 If approved, a person engaged in solid waste disposal shall then comply with all conditions and requirements in its permit N J A C 7 26-2 11(b)9 A

violation of a solid waste regulation violates the Solid Waste Management Act N J S A 13 1E-9a

The Solid Waste Management Act mandates the imposition of civil administrative penalties whenever the Department finds a person has violated any of the Act s provisions or any rule or regulation adopted or permit issued pursuant to the Act N J S A 13 1E-9b, Rollins Envir Services v Weiner, 269 N J Super 161, 168 (App Div 1993), N J DEP v Lewis, 215 N J Super 564, 575 (App Div 1987) The Solid Waste Management Act is a strict liability statute, regardless of intention to violate or mens rea "Only the doing of the proscribed act need be shown " Lewis, supra, at 575 Penalties are calculated pursuant to N J A C 7 26-5 5

DISCUSSION

The findings of fact proposed by petitioner in connection with the underlying violations and penalty are well supported by the testimony and documents in this matter I found the testimony of witnesses Ron Feehan, Tom Byrne, and Rai Belonzi to be very credible

Mr Feehan is an experienced DEP solid waste inspector of twenty-five years and has conducted numerous inspections over and above those connected with this matter He did not appear biased as generally asserted by respondent On the contrary, Feehan was very evenhanded and, at times, appeared sensitive to some of the arguments raised by respondent during cross examination His testimony was based on his own recollections together with contemporaneous notes made during inspections over the two year period Feehan established, to my satisfaction, that the violations set forth in the findings of fact occurred

Rai Belonzi, Chief of the DEP s Bureau of Solid Waste and Enforcement, also testified Belonzi worked for the DEP for approximately twenty-five years He testified in support of the $700,000 penalty Like Feehan Belonzi did not appear to portray any significant bias against respondent He concluded that Magic's violations were moderately serious He further concluded that Magic's conduct was major His

conclusions were well supported by the testimony and documents in the record This includes Magic's prior history, repeated violations and respondent's failure to take corrective action over the two years in question

Many of the asserted infractions could have easily been corrected For example, respondent could have easily controlled the tonnage received and limited its daily solid waste intake to the approved 125 tons, installed movable barriers, or confined the operations to the approved site plan footprint Respondent either ignored or intentionally refused to comply with the numerous notices of violation related to these and many other matters Respondent simply ignored the NJDEP Much of this case could have been resolved or even avoided merely by demonstrating a willingness to comply But respondent choose the wrong path Respondent's conduct, both here and in related matters before the Superior Court, demonstrates a pattern of defiance rather than cooperation For these reasons alone I **AGREE** with the NJDEP s assessment that the conduct was **major**

I **AGREE** with the assessment of **moderate** as the degree of seriousness There were numerous violations covering two years While there was no actual serious environmental event, the risk of ore was ever present Piling excess tonnage throughout the property and in the building made the entire property a fire hazard The failure to run the air handler exposed the employees and the residents to unsafe air quality These alone are examples of **moderate**, if not **major** violations

I did not find the testimony of Mr Waszen very persuasive He appeared frustrated with the rules and regulations applicable to his operation His tone and demeanor was that of someone who rejected these important environmental safeguards as unnecessary, excessive and unimportant Rather than comply with the rules, he sought to avoid them Business volume was his primary focus, rather than the health, safety and welfare of the environment, his employees and neighbors This was evident by his continuing acceptance of excess tonnage of SW, and his failure to do simple things like turn on the air handler, cleaned the tipping floor, or install movable barriers

This case, from the onset, was primarily about the penalty rather than the underlying violations See, Magic's opening statements at Tr1@14(22)-16(16), Magic s closing brief dated August 28, 2007 This is not to suggest that some of the violations were not disputed But, it has been respondent's position all along that the imposition of any fines should be a base penalty only (minimum) **I DISAGREE** for a variety of reasons

Respondent's activities or violations spanned over twenty dates during a two year period (February 6, 2004 through December 8, 2004) They increased in number, rather than decreased, as time progressed Many of the violations are repeated throughout this period The NJDEP could have imposed a penalty for each specific violation rather than consolidating the multiple infractions that occurred on each day A penalty of $35,000 has been imposed for twenty specific dates, totaling $700,000 There are well in excess of 100 specific violations occurring over the twenty days This could have resulted in a penalty in the millions of dollars A penalty for each specific violation on each given day, would not have been unreasonable, given the environmental risk and conduct involved

Magic's poor operation exposed the environment, its employees and the area residents to potential rodent problems, odor, unsafe air particulates and unmanaged leachate to name just a few Although there was no significant environmental event, the purpose of the permit conditions and environmental regulations are to be proactive, so as to prevent such events Respondent's attitude seemed to be indifferent to the regulations or the conditions in the permit This conduct exposed the site and neighborhood to added risks Notwithstanding the risks, the NJDEP minimized the penalty by only asserting it on a daily basis rather than on a per violation basis Thus, respondent's argument that the penalty is unreasonable, excessive, or inequitable, is without merit

Respondent also asserts the penalty includes a deterrence amount which is unnecessary or excessive citing, NJDEP Hazardous Waste Compliance and

Enforcement v IGI, Inc , EHW 4441-02 Initial Decision (March 3, 2006), adopted in part and rejected in part, Comm'r (June 28, 2006) <http //lawlibrary rutgers edu/oal/search html> Respondent is already out of the solid waste transfer business and cannot reopen without the approval of the DEP In IGI, ALJ John Shuster observed the likelihood of a reoccurrence "is almost nil as a result of corrective actions taken by the violator" Ibid Judge Shuster recognized IGI's mitigation efforts and reduced the deterrence part of the penalty accordingly In the instant matter, Magic took no notable action to correct the violations during the two years in question And, respondent still works in the solid waste industry as a hauler Thus, the deterrence component of the penalty remains in play because it works to deter Magic and others from engaging in similar behavior and encourages solid waste operators or haulers to mitigate once a violation has occurred

Respondent claimed to be a victim of a conspiracy between the Atlantic County Utility Authority (ACUA) and the NJDEP The ACUA is, to some degree, a competitor of respondent Respondent claimed that the NJDEP conspired with the ACUA to put it out of business The record is devoid of any such proofs These claims or defenses were merely a distraction from the underlying violations and hypothetical at best When a violation occurred, respondent blamed someone else rather than accept responsibility and implement proper remediation

In sum, I **CONCLUDE** the NJDEP met its burden It was amply established by the preponderance of credible evidence that at least one or more violations occurred on each of the twenty dates indicated The NJDEP also established that the violations were **moderate** and the conduct was **major**

ORDER

I **ORDER** that the decision the NJDEP and penalty of $700,000 be **AFFIRMED** The action file by respondent Magic Disposal is **DISMISSED**

OAL DKT NO ESW 4763-05

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N J S A 52 14B-10

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention Exceptions" A copy of any exceptions must be sent to the judge and to the other parties

October 11, 2007
DATE

W. TODD MILLER, ALJ

Date Received at Agency

10-11-07

Mailed to Parties

OCT 15 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

OAL DKT NO ESW 4763-05

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner

Ronald S Feehan
Thomas Byrne
Alber Raimund (Rai) Belonzi

For Respondent

Douglas Wayne Norman
Steve Waszen

EXHIBITS

For Petitioner

P-1 Magic Disposal Permit for Solid Waste Transfer Station Facility, June 7, 1996
P-2 As-Built Plan Permit Renewal, last update May 31, 2001
P-3 Lease Agreement between Steve Waszen, Magic Disposal (tenant) and Mike Importico (landlord), dated August 3, 1995
P-4 Notice of Violation, February 6 2002
P-5 Compliance Evaluation Report, April 29, 2002
P-6 Notice of Violation, April 29 2002
P-7 Compliance Evaluation Report, June 10, 2002

P-8 Notice of Violation, June 10, 2002

P-9 Compliance Evaluation Report, July 31, 2002

P-10 Notice of Violation, August 2, 2002

P-11 Inspection Report Narrative, September 18. 2002

P-12 Notice of Violation September 19, 2002

P-13 Compliance Evaluation Report, January 17 2003

P-14 Notice of Violation, January 21, 2003

P-15 Compliance Evaluation Report, March 7, 2003

P-16 Notice of Violation, from March 7, 2003 inspection

P-17 Compliance Evaluation Report, May 16, 2003

P-18 Notice of Violation, May 19, 2003

P-19 Compliance Evaluation Report, July 22, 2003

P-20 Notice of Violation, July 25, 2003

P-21 Inspection Report Narrative, September 9, 2003

P-22 (A through Q) Photographs, September 9, 2003

P-23 Notice of Violation, September 10, 2003

P-24 Inspection Report Narrative October 9, 2003

P-25 (A through D) Photographs, October 9, 2003

P-26 Notice of Violation, October 14, 2003

P-27 Compliance Evaluation Report, Narrative, October 23, 2003

P-28 Notice of Violation, October 27, 2003

P-29 Compliance Evaluation Report, Narrative, January 8, 2004

P-30 Notice of Violation, January 12, 2004

P-31 Compliance Evaluation Report, Narrative, February 27, 2004

P-32 Notice of Violation, March 1, 2004

P-33 Compliance Evaluation Report, Narrative, March 31, 2004

P-34 Notice of Violation, April 13, 2004

P-35 Compliance Evaluation Report, Narrative, May 5. 2004

P-36 Notice of Violation, May 7, 2004

P-37 Letter from David DeClement, Esquire to Ronald Feehan, NJDEP, dated May 26, 2004, re May 10, 2004 NOV

P-38 Compliance Evaluation Report, Narrative June 23. 2004

P-39 (A through L) Photographs, June 23, 2004

P-40 Notice of Violation, June 24, 2004

P-41 Inspection Report Narrative, July 30, 2004

P-42 Notice of Violation, August 3, 2004

P-43 Compliance Evaluation Report, Narrative, September 15, 2004

P-44 (A through C) Photographs, September 15, 2004

P-45 Notice of Violation, September 16, 2004

P-46 Compliance Evaluation Report, December 8, 2004

P-47 Notice of Violation, December 10, 2004

P-48 Consent Order, I/M/O NJDEP v Magic Disposal and Steven Waszen, dated May 14, 2004

P-49 Cover Letter and Order from Hon George L Seltzer, P J Ch to Todd Steadman, D A G and David DeClement, Esq , dated October 31, 2001

P-50 Case Management and Settlement Order, County of Atlantic v Magic Disposal, dated January 22, 2002

P-51 Administrative Order and Notice of Civil Administrative Penalty Assessment, February 4, 2005

P-52 Lexis printout of N J A C 7 26-5 5, Civil administrative penalty determination

P-53 Administrative Order and Notice of Civil Administrative Penalty Assessment, July 17 2000

P-54 Final Order – Administrative Order and Notice of Civil Administrative Penalty Assessment, September 15, 2000

P-55 Order, County of Atlantic v Magic Disposal, Inc , August 2, 2001

P-56 Order, County of Atlantic v Magic Disposal, December 17, 2003

P-57 Order, County of Atlantic v Magic Disposal, Inc , July 27, 2004

P-58 Supplement to Standard Solid Waste Application Form CP#1, 8/3/95

P-59 Magic Disposal Response to Notice of Deficiency, 1/30/96

P-60 Magic Disposal Response to DEP Comments to Minor Mod Application, 5/20/98

P-61 Magic Disposal Operations and Maintenance Manual Modifications, Fourth Modification approved 10/2000

For Respondent

None

Joint

J-1 Stipulation of Facts

J-2 Stipulation of Facts

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO 35090

JP RAIL, INC
– LEASE AND OPERATION EXEMPTION –
NAT INDUSTRIES, INC

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION PETITION
TO REVOKE EXEMPTION
OR IN THE ALTERNATIVE TO STAY
EFFECTIVENESS OF EXEMPTION

Exhibit C

State of New Jersey

JON S. CORZINE
Governor

DEPARTMENT OF ENVIRONMENTAL PROTECTION
COUNTY ENVIRONMENTAL AND WASTE ENFORCEMENT
BUREAU OF SOLID WASTE COMPLIANCE AND ENFORCEMENT
300 HORIZON CENTER
P.O BOX 407
TRENTON NJ 08625-0407
Tel. (609) 584-4180
Fax.(609) 588-2444

LISA P JACKSON
Commissioner

CERTIFIED MAIL/RRR
7005 1160 0000 3680 3387

November 9, 2006

Mr Steven Wazen
MAGIC DISPOSAL INC
2520 Tremont Ave
Egg Harbor, NJ 08234

RE: NOTICE OF REVOCATION
MAGIC DISPOSAL INC
2520 Tremont Ave
Egg Harbor Twp, NJ 08232

EA ID #. PEA050004 - 135866

Dear Mr. Wazen.

Enclosed for service upon you is Notice of Revocation issued by the Department pursuant to the provisions of the Solid Waste Management Act, N.J.S.A. 13.1E-1 et seq., and/or the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq.

The Department may be available to meet informally with the principals of the case to discuss the enclosed enforcement action. Should such a meeting be requested and granted, be advised this does not affect the time frame within which you may request an administrative hearing under the **NOTICE OF RIGHT TO A HEARING** provision in the enclosed Notice of Revocation

Should you have any questions concerning the enclosed Notice of Revocation or wish to request an informal meeting, please contact me at (609) 584-4180.

Sincerely,

A. Raymund Belonzi, Chief
Bureau of Solid Waste Compliance and Enforcement

Cc: Harley Williams, DAG
Sukhdev Bhalla, Chief

IN THE MATTER OF MAGIC DISPOSAL, INC. AND STEVEN WASZEN, SR.

EA ID #: PEA050004 – 135866

REVOCATION OF CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AND SOLID WASTE TRANSPORTER REGISTRATION OF MAGIC DISPOSAL, INC., AND DEBARMENT OF STEVEN WASZEN SR. FROM SOLID WASTE AND RECYCLING INDUSTRY

The following DECISION and ORDER is issued pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection ("the Department", "NJDEP", or "DEP") by N.J.S.A. 13:1D-1 et seq., the Solid Waste Management Act, N.J.S.A. 13.1E-1 et seq. ("SWMA"), and the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq. ("SWUCA"), and duly delegated to the Director of County Environmental and Waste Enforcement pursuant to N.J.S.A. 13:1B-4.

COUNT I
REVOCATION OF CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

1. Magic Disposal, Inc. ("Magic") is a registered solid waste transporter licensed since May 4, 1989 under the SWMA to transport solid waste in New Jersey, and with a certificate of public convenience and necessity ("CPCN") issued March 30, 1990 pursuant to SWUCA. Magic's solid waste registration number is 16512, and its CPCN number is SW1718 Steven Waszen, Sr. ("Waszen") owns 97% of the equity of Magic, and is its sole officer. Magic and Waszen are sometimes referred to collectively herein as "Respondents".

2 Pursuant to N.J.A.C. 7:26H-1.19 and N.J.A.C. 7 26H-5.9(b), every utility engaged in solid waste collection and disposal must file on or before the due date established by the Department an annual report summarizing its ownership, financial condition, contractual arrangements, and operations for the preceding year, and a statement of income and expenses for a calendar year period on forms prescribed and furnished by the Department. Failure to file such annual reports constitutes grounds for revocation of any permit, license, or other operating authority issued under the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq. N.J.A.C. 7 26H-5.15(f)1. Magic has not submitted annual reports to the Department for calendar years 2002, 2003, 2004, and 2005.

3 Pursuant to N.J.A.C. 7:26H-1.11, the Department may, upon notice, after hearing, by order in writing, revoke or suspend a Certificate of Public Convenience and Necessity issued to any person engaged in the solid waste collection or solid waste disposal business upon finding that such person failed to submit the annual fee as required by N.J.S.A. 48:13A-7.4, and the

annual assessment as required by N.J.S.A. 48:2-62, on or before the deadlines established by the Department. Despite repeated demands by the Department, Magic has failed to submit the annual fee and assessment for fiscal years 2004, 2005 and 2006.

CONCLUSION

Based on the foregoing, the Department hereby revokes Magic's Certificate of Public Convenience and Necessity pursuant to N.J.A.C. 7:26H-1 et seq

COUNT II
REVOCATION OF A-901 APPROVAL OF MAGIC DISPOSAL, INC. AND DEBARMENT OF STEVEN WASZEN, SR. FROM SOLID WASTE AND RECYCLING INDUSTRY

4. The Department repeats the allegations of Count I as if set forth herein at length.

A. **The Egg Harbor Township Transfer Station Violations**

5. On or about January 25, 2005, the Department issued a final decision terminating Magic Disposal, Inc.'s permit and authority to operate a solid waste facility transfer station, facility ID# 131825 in Egg Harbor Township, Atlantic County. A true copy of that final decision is attached hereto as Attachment A. Those allegations are incorporated herein as if set forth at length. Magic withdrew its appeal of DEP's final decision revoking its Transfer Station permit.

6. The Department issued an Administrative Order and Notice of Civil Administrative Penalty Assessment ("AONOCAPA") against Magic on January 28, 2005 seeking $700,000 in penalties for numerous solid waste violations committed by Magic at its Egg Harbor Transfer Station. See in the Matter of Magic Disposal Inc. TS/MRF, 3043 Ridge Avenue, Egg Harbor Twp., NJ 08234, OAL Docket No. ESW 4763-05S, EA ID# PEA050001-131825. A true copy of that AONOCAPA is attached here as Attachment B. The allegations set forth therein are hereby incorporated herein as if set forth at length.

7. In 2001, Atlantic County and the State of New Jersey each filed a verified complaint against Magic for improper management of its Egg Harbor Township Transfer Station (the "Transfer Station"). Each verified complaint sought and obtained injunctive relief to compel Magic to conform to the requirements of its permit and applicable transfer station regulations. The matters were captioned and docketed as County of Atlantic v. Magic Disposal, Docket # ATL-C-84-01E; and The State of New Jersey, Department of Environmental Protection v. Magic Disposal and Steven Waszen, Docket # ATL-C-121-01. True copies of the State's verified complaint, and the County's verified complaint, are attached hereto as Attachments C and D respectively. The allegations in each complaint are incorporated herein as if set forth at length. In each case the Court found Magic Disposal, Inc. in violation of its transfer station permit, and the applicable transfer station regulations.

8. On June 7, 2005, given Magic's repeated non-compliance with its permit, with the applicable transfer station regulations, and with orders of the Court, Judge William Todd in the Atlantic County action issued an Order to Magic to cease and desist operations at its transfer station, including recycling activity.

9 In addition, on June 28, August 22 and October 12, 2005, Judge Todd issued orders denying Magic's request to reopen its Transfer Station for Class A recycling operations. The August 22, 2005 order found that Magic's facility was not included in Atlantic County's Solid Waste Management Plan. Despite these orders, Magic subsequently engaged in Class A operations on at least two occasions, February 17 and February 27, 2006.

B. Mullica Township Violations

10. On or about August 15, 2003, and October 21, 2003, Frank J. Perona, Jr., transferred his interest in Block #10802, Lots #1 and 2 respectively, in the Township of Mullica (the "Site"), to Waszen.

11. As part of Magic's acquisition of the Site Magic agreed to assume responsibility for a county lien that had been placed on the property when it was owned by Perona. The amount due under the lien totals $324,500. The lien has not been paid.

12. On or about October, 2003, Magic, under the direction of Waszen, engaged in illegal dumping of construction and demolition debris upon a portion of the Site Approximately 30 dump truck loads of demolition debris was dumped on the Site by Magic Atlantic County filed suit against Steven Waszen, trading as Magic Disposal, and others in the Municipal Court of Mullica Township in a case captioned County of Atlantic et al v. Steven Waszen t/a Magic Disposal et al., instrument # 4006812. The lawsuit eventuated in a Consent Order dated December 16, 2003, between Waszen, and Mullica Township and Atlantic County, in which the Municipal Court (Henry G Broome, Jr., J.M.C.) ordered a cleanup of the Site. In the Consent Order the Court found that the construction and demolition materials were dumped on the property, and that these materials were disposed of at the direction of defendant, Steven Waszen, Sr., over a period of approximately 49 days. Further, Waszen plead guilty to count two of the County's Complaint concerning violations of N.J.A.C. 7:26.

13 The Consent Order assessed a penalty of $49,000 00, pending compliance by Waszen in remediating the Site. The Consent Order provided that the penalty could be reduced based upon Waszen's compliance with the Order. Because Waszen failed to comply with the Order, the penalty was not reduced.

14 On August 17, 2004, a Supplemental Consent Order was entered dealing with Waszen's failure to comply with the December 16, 2003, Consent Order. Again the Court held the penalty in abeyance pending the performance of Waszen and Magic. Again, Waszen and Magic failed to remediate the Site.

15 Therefore, on November 5, 2004, yet another Supplemental Order was entered again mandating remediation of the Site and assessing a penalty of $100 00 per day for each additional day that the Site remained unremediated commencing October 19, 2004.

16. On February 1, 2005, the Court assessed a $15,000 penalty on Waszen for non-compliance with its prior orders and yet again ordering remediation of the Site.

17 On April 19, 2005, the Court assessed another penalty of $30,000 on Waszen for failure to comply with its February 1, 2005 Order, and again ordered remediation of the Site.

18. Waszen and Magic still failed to clean up the Site. At a hearing held on May 17, 2005, the Court found that Waszen had still not complied with the Court's prior Orders and assessed additional penalties of $184,000.

19. The Consent Order further provided that "no additional solid waste or recyclable materials may be brought to the property for storage, processing or other purposes by any party. This prohibition shall include materials dumped on the ground and materials stored in roll off containers from any other source or other property." The Order also required that no further activity, except for cleanup activity, take place at the Site. Notwithstanding the terms of the Order, after its entry Magic and Waszen cleared a wooded area in excess of 5000 square feet and stockpiled rock or gravel at the Site.

C. **Failure to File Federal and State Tax Returns:**

20. Magic has not filed Federal corporate income tax returns for 1999 and all years subsequent thereto.

21. Waszen has not filed Federal personal tax returns for 1999 and all years subsequent thereto.

22. Magic has not filed State Corporation Business Tax returns for the years 2003, 2004, and 2005.

23. Waszen has not filed State Gross Income Tax returns for the years 2002, 2003, 2004, and 2005.

D. **Unpaid Judgments and Liens Filed against Magic and Waszen, and Misrepresentations Regarding Same**

24. A Federal tax lien bearing lien number FL-01860110 in the amount of $543,097.85 was filed against Magic on July 29, 1999. The taxes remain unpaid.

25. A Federal tax lien bearing lien number FR-00890011 in the amount of $98,215 was filed against Magic on September 27, 1997. The taxes remain unpaid.

26. A Federal tax lien in the amount of $67,409.75 was filed against Magic bearing lien number FR-02016205-2002 on February 2, 2002. The taxes remain unpaid.

27. A Federal tax lien bearing lien number FL-00067028-2005 in the amount of $1,110,659.99 was filed against Magic on June 23, 2005. The taxes remain unpaid

28. A Federal tax lien bearing lien number FL-00067029-2005 in the amount of $24,308.14 was filed against Magic on June 23, 2005. The taxes remain unpaid

29. A Federal tax lien bearing lien number FL-00161831-2001 in the amount of $376,063.07 was filed against Magic on March 2, 2001. The taxes remain unpaid.

30. Magic owes the State of New Jersey, Department of Environmental Protection, a penalty of $9,851.00 on a judgment docketed against it on August 14, 2001. (DJ-00230258-2001). The judgment remains unpaid.

31. Waszen owes Atlantic County $324,500 for a county lien assumed by Magic on Block 10802, Lots 1 and 2, Mullica Township, when that property was transferred to Waszen from Frank Perona. This lien was assumed on January 24, 2003.

32. Magic owes the Atlantic County Division of Public Health $15,000.00 on a judgment (J-135241-2005) obtained against it by the County entered on December 12, 2003 Magic has not satisfied this judgment.

33. Magic owes the Atlantic County Division of Public Health $20,815 00 on a judgment (J-135244-2005) obtained against it by the County and entered on June 1, 2005 Magic has not satisfied this judgment.

34. Magic owes the Atlantic County Department of Law a penalty of $100,000 pursuant to a judgement (J-135254-2005) entered against it on June 1, 2005, which remains unpaid.

35 Magic owes the Cumberland County Improvement Authority fees of $255,279 22 pursuant to a judgement (J-143111-2005) entered against it on June 13, 2005, which remain unpaid.

36. Magic owes the County of Atlantic a penalty of $250,000 pursuant to a judgement (J-143111-2005) entered against it on July 27, 2004, which remains unpaid.

37. Magic owes the Township of Egg Harbor a penalty of $27 914 15 pursuant to a judgement (J-002442-2004) entered against it in August, 2004, which was only recently, and only partially, paid. Magic is delinquent from September 2004 to present and owes $9,046 00 plus in interest

38 Magic owes Farr Burke Gambacorta and others $17,092.58 pursuant to a judgement entered against it on October 25, 2002, which it has only partially paid.

39. In an A-901 deposition held April 13, 2006, Waszen stated that the judgments owed to the County of Atlantic were resolved and had been waived. The judgments have not been waived and these large penalty amounts have not been resolved.

40. In that deposition Waszen also stated that, with respect to litigation regarding ownership of the Perona property, "there is no lis pendens." This representation was false; there is a lis pendens from the Perona litigation on one of the lots that Magic is attempting to sell.

E. **Failure to Pay Cumberland County Improvement Authority Tipping Fees:**

41. Magic established an account with the Cumberland County Improvement Authority ("CCIA") in early 2000 to deposit waste at CCIA's landfill. Magic quickly defaulted on payment of tipping fees to the CCIA. Magic was therefore denied access to CCIA by written notice dated August 21, 2000, and to this date is still denied access.

42. On or about September 13, 2000, the CCIA sued Magic for unpaid fees and interest in Superior Court, Law Division, in Cumberland County (Docket # CUM-L-001033-R) in the amount of $255,279.22.

43 A settlement was reached on January 24, 2001 between Magic and CCIA CCIA accepted a proposal whereby it would be paid in full the outstanding book account balance of $255,279.22 at issue in the action in three installments, the first due February 28, 2001. Magic failed to pay the settlement, forcing the CCIA to seek judicial relief After application by the CCIA, on May 25, 2001, the Court entered an order providing, "The previous settlement between the parties reached on January 24, 2001 is hereby reduced to judgment in the amount of $255,279.72 together with judgment interest accruing from February 28, 2001." Magic has paid only $25,000 against the judgment.

F. **Penalty Assessments Which Have Become Final But which Are Unsecured by Judgment or Lien:**

44. On October 27, 2004, the Township of Egg Harbor issued Violation # 20040100 against Waszen for constructing a large garage/storage/office building without a building permit or other Township approvals. The penalties thereunder as of June 2, 2006 totalled $169,740 and continue to increase at $2000 per day. The time to appeal the violation has expired.

45. On October 27, 2004, the Township of Egg Harbor issued a second Violation, # 20040101 against Waszen for ignoring a stop work order. The penalties thereunder as of June 2, 2006 totalled $1,236,000 and continue to increase at $2000 per day. The time to appeal the violation has expired

CONCLUSION

A. Pursuant to N.J.S.A. 13 1E-133(a), N.J.A.C. 7:26-16.8(a), N.J.A.C 7:26-16 9(a)(1) and N.J.A.C. 7:26-3.2, Magic no longer exhibits sufficient, reliability, expertise, competency and integrity to operate a solid waste business in accordance with the standards set forth under the Solid Waste Management Act and the Department's regulations implementing the Act.

B. Pursuant to N.J.S.A. 13:1E-133(c), N.J.A.C. 7:26-16.9(a)(l), N.J.A.C. 7:26-16 8(d), the Attorney General has determined that there is a reasonable suspicion to believe that Steven Waszen, Sr. does not possess a reputation for good character, honesty and integrity.

C. Pursuant to N.J.S.A. 13:1E-133(e), N.J.A.C. 7:26-16.8(f) and N.J.A.C. 7:26-16.9(a)(1), Steven Waszen, Sr. has pursued economic gain in an occupational context which is in violation of the criminal or civil policies of this State, and such pursuit has created a reasonable belief that the participation of Steven Waszen, Sr. in the solid waste industry would be inimical to the policies of the Solid Waste Management Act.

D. Pursuant to N.J.S.A. 13:1E-128(b), N.J.A.C. 7:26-16.7, and N.J.A.C 7.26-16.8(1), Waszen failed to cooperate in an inquiry conducted by the Attorney General by failing to give credible, accurate, responsive, reliable and truthful answers to questions regarding material facts posed by the Attorney General, and by providing knowingly false information which was untrue as to material facts.

E. Pursuant to N.J.S.A. 13:1E-134(a) and N.J.A.C. 7:26-16.9(a)1 and N.J.A.C. 16.9(a)2, the foregoing constitutes grounds for revoking the solid waste transporter registration of Magic, and for debarring Waszen from the solid waste and recycling industry WHEREFORE, based upon the facts set forth herein, the solid waste transporter registration of Magic Disposal, Inc. is hereby REVOKED. Any operating authority under which Magic has been operating under in the State of New Jersey is hereby REVOKED. The Department further DEBARS Steven Waszen, Sr. from participation in the solid waste and recycling industry from the date this determination becomes final.

NOTICE OF RIGHT TO A HEARING

I. Pursuant to N.J.S.A. 52:14B-1 et seq., and N.J.S.A. 13.1E-133 and 134, Respondents are entitled to an administrative hearing on this Notice of Revocation of Certificate of Public

Convenience and Necessity and Solid Waste Transporter Registration and Debarment. Any hearing request must be delivered to the address referenced in the paragraphs below within thirty (30) calendar days from receipt of this document.

II. Application for an administrative hearing shall be made to:

New Jersey Department of Environmental Protection
Office of Legal Affairs
ATTENTION: Adjudicatory Hearing Requests
401 East State Street, P.O. Box 402
Trenton, New Jersey 08625-0402

with copies to:

Sukhdev Bhalla, Bureau Chief
Division of County Environmental Waste Enforcement
Bureau of Solid and Hazardous Waste Regulation
401 East State Street, P. O. Box 422
Trenton, New Jersey 08625

A. Raimund Belonzi, Chief
Division of County Environmental Waste Enforcement
Bureau of Solid Waste Compliance and Enforcement
300 Horizon Center, P. O. Box 407
Trenton, New Jersey 08625

Harley A. Williams, DAG
New Jersey Department of Law & Public Safety
Division of Law
Hughes Justice Complex
P. O. Box 093, Trenton, New Jersey 08625-0093

III. Pursuant to N.J.S.A. 52:14B-9(b) and N.J.A.C. 1:1-6.1(b) Respondents shall in any request for a hearing furnish NJDEP with the information contained in the attached HEARING REQUEST CHECKLIST and shall comply with all conditions and instructions thereof, in order for the hearing request to be considered a valid request.

IV Failure to submit a timely hearing request will be deemed a waiver of respondents' right to a hearing, and will result in the final revocation of Magic's Certificate of Public Convenience and Necessity and its solid waste transporter registration, and debarment of Waszen from the solid waste and recycling industries on the thirty-first day following receipt of this notice.

ADDITIONAL PROVISIONS

V. This revocation of its Certificate of Public Convenience and Necessity, and solid waste transporter registration, is binding on Magic, and any agents, successors, assignees, any trustee in bankruptcy or other trustee, and any receiver appointed pursuant to any proceeding in law or equity.

VI. Notice is further given that violations other than those cited herein of any statutes or regulations may be cause for additional actions, either administrative or judicial By issuing this Notice the Department does not waive its right to institute additional enforcement actions.

DATE: 11/3/06

John A. Castner, Director
County Environmental and Waste Enforcement

ADMINISTRATIVE HEARING REQUEST CHECKLIST AND TRACKING FORM FOR ENFORCEMENT DOCUMENTS

I Enforcement Document Being Appealed

Magic Disposal, Inc
Administrative Order and Notice of Civil Administrative Penalty Assessment
Title of Enforcement Document

November 9, 2006

Issuance Date of Enforcement Document

Document Number (if any)

II Person Requesting Hearing

Steve Waszen, Owner

Name

David M DeClement, Esq

Name of Attorney, if applicable

Magic Disposal, Inc
2520 Tremont Avenue
Egg Harbor Twp, NJ 08234

Address

55 Simpson Ave, PO Box 217
Pitman, NJ 08360

Address of Attorney

III Please Include the Following Information as Part of Your Request

A The date the alleged violator received the enforcement document being contested
B A copy of the enforcement document and a list of all issues being appealed,
C Any admission or denial of each of the findings of fact, or a statement of unwritten knowledge,
D The defenses of each of the findings of fact in the enforcement document,
E Information supporting the request,
F An estimate of the time required for the hearing,
G A request, if necessary, for a barrier free hearing location for physically disabled persons,
H A clear indication of any willingness to negotiate a settlement with the Department prior to the Department's processing of your hearing request to the Office of Administrative Law, and
I This form, completed, signed and dated with all of the information listed above, including attachments, to

1 Office of Legal Affairs
ATTENTION: Adjudicatory Hearing Requests
Department of Environmental Protection
401 East State Street, Box 402
Trenton, New Jersey 08625-0402

RECEIVED
NOV 29 2006
ENVIRONMENTAL
ENFORCEMENT SECTION

2 Sukhdev Bhalla, Bureau Chief
Division of County Environmental Waste Enforcement
Bureau of Solid and Hazardous Waste Regulation
401 East State Street, PO Box 422
Trenton, New Jersey 08625

3 A. Raymond Bekanz, Chief
Division of County Environmental Waste Enforcement
Bureau of Solid and Waste Compliance and Enforcement
300 Horizon Center, PO Box 407
Trenton, New Jersey 08625

4 Harley A. Williams, DAG
New Jersey Department of Law & Public Safety
Division of Law
Hughes Justice Complex, PO Box 093
Trenton, New Jersey 08625

IV Signatures

November 28 2006

Date

ADMINISTRATIVE HEARING REQUEST CHECKLIST AND TRACKING FORM FOR ENFORCEMENT DOCUMENTS

III

A November 16, 2006

B Attached

C Answers to Findings

COUNT I

1 Admitted
2 Denied
3 Denied as to failure to submit, the remaining section is a legal conclusion left to the trier of fact

COUNT II

5 Admitted
6 Admitted as to issuance, denied as to any wrong doing
7 Admitted as to issuance, denied as to any wrong doing
8 Denied as to contents of Order
9 Denied
10 Admitted
11 Admitted as to non payment, denied as to a current obligation
12 Denied
13 Denied
14 Denied
15 Denied
16 Denied
17 Denied
18 Denied
19 Denied
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35 Denied
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41 Denied

42 Denied
43 Denied
44 Denied
45 Denied

D While Magic may have violated certain section of its transfer station permit there have never been allegations of environmental harm nor risks to human health Magic has never received a violation as to its hauling operations Judge Todd did not decide that the facility was not a Class A facility He requested a hearing and the County has always maintained it was in the Plan as a Class A The tax lien was in no way caused by an act or omission of Waszen, he came to the land and remediated the same Mr Waszen's actions were of a public benefit The only non compliance was due to constraints out of his control All tax returns have been filed and all outstanding sums are either paid or in the process of payments being made The same is true of all liens The matters before Atlantic and Cumberland Counties have also been resolved or are in the process of resolution As to the matter before the OAL, these are only allegations and have not been adjudicated Concerning the Township of Egg Harbor, neither Mr Waszen nor counsel has any information regarding these events

E The documents to support Item D will be supplied under separate cover, they can not be produce within the time to answer

F Five (5) days

G N/A

H The respondent is willing to negotiate

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO 35090

JP RAIL, INC
– LEASE AND OPERATION EXEMPTION –
NAT INDUSTRIES, INC

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION PETITION
TO REVOKE EXEMPTION
OR IN THE ALTERNATIVE TO STAY
EFFECTIVENESS OF EXEMPTION

Exhibit D

NOTICE OF UNSAFE STRUCTURE

Permit #
Date Issued
-or-
Control #

IDENTIFICATION

Work Site Location 16 N. FRANKLIN BLVD. Block 265 Lot 3 Qualification Code ____
PLEASANTVILLE, NJ 08232

Owner n Fee JP RAIL INC
Address 2732 E. ANN ST
PHIL, PA 19134

Agent ____
Address ____

To ☒ Owner ☐ Other: ____
☐ Agent/Contractor

DATE OF INSPECTION 9/17/07 DATE OF THIS NOTICE 11/05/07

ACTION

Take NOTICE that as a result of the inspections conducted by this agency on ____ on the above property, an unsafe condition has been found to exist pursuant to N.J.S.A. 52:27D-132 and N.J.A.C. 5:23-2.32. The building or structure, or portion thereof, deemed an unsafe condition is described as follows.

SEE ATTACHED LIST

You are hereby *ORDERED* to

☒ Vacate the above structure by 11/30/07.

[ ] Demolish the above structure by ____ or correct the above noted unsafe conditions by no later than ____.

Failure to correct the unsafe condition or refusal to comply with this *ORDER* will result in this matter being forwarded to legal counsel for prosecution and assessment of penalties up to $500 per week per violation. You must immediately declare to the Construction Official, your acceptance or rejection of the terms of this *ORDER*.

Any building or structure vacated pursuant to this *ORDER* shall not be reoccupied unless and until a certificate of occupancy is issued by the Construction Official.

Should you wish to contest the validity of the above action in accord with N.J.A.C. 5.23-2.38, you may do so by filing within fifteen (15) days from the receipt of this notice a request for a hearing before an administrative law judge by contacting:

Hearing Coordinator
Division of Codes and Standards
PO Box 802
Trenton, NJ 08625-0802

If you have any questions concerning this matter, please call: 609 984-7672

By Order of: John F Dotoli Date 10/23/07
CONSTRUCTION OFFICIAL

JOHN F DOTOLI

U.C.C. FM1(4/2003)

16 N Franklin Blvd Pleasantville, NJ 08232

The following code references are from the International Building Code 2000, NJ Edition (IBC) and the NJ Uniform Construction Code (NJAC 5 23)

1 Submit three sets of signed and sealed construction documents for building, fire, plumbing and electrical systems NJAC 5 23-2 15.
2 Provide signed and sealed evidence indicating approval of required inspections as referenced in NJAC 5 23-2 18

The following code references are from the National Electrical Code 2002

1	110 26(A)	Working space around electrical equipment
2	110 26(D)	Illumination removed
3	225 22	Raceway need for grounded conductor
4	250 24(A)	Service grounded conductor need in service disconnect
5	250 20(D)	Grounding of separately derived system
6	250 50	Verify grounding electrode system
7	250 120	Equipment grounding conductor not installed
8	408 16(F)	Back-fed breaker shall be secured in place
9	110 12(A)	Close unused openings
10	314 25	Cover need on box

State of New Jersey
Department of Community Affairs
Office of Regulatory Affairs
Post Office Box 818
Trenton, New Jersey 08625-0818

Date 11-5-07

In the Matter of: Southern Railway Facility
(J P Rail, Inc , Owner)
16 North Franklin Boulevard
Block 265, Lot 3
Pleasantville, New Jersey 08232

ORDER
Compliance Number:
OR-031-07

Please take NOTICE that the Department has reviewed the above referenced project pursuant to N J S A. 52 27D-124k. and N J A C 5:23-4.3(f)2 which in pertinent part read as follows:

52:27D-124. Powers of the Commissioner

The commissioner shall have all the powers necessary or convenient to effectuate the purposes of this act, including but not limited to, the following powers in addition to all others granted by this act

k. To supplant or replace the local enforcing agency for a specific project, -

5:23-4.3 Municipal enforcing agencies-establishment

(f) Department intervention.

2 In any case where it may find it necessary to do so, the Department may supplant or replace a local enforcing agency for a specific project.

Please take NOTICE that the Department has determined that it is in the public interest for the Department to administer and enforce the provisions of the Uniform Construction Code in connection with this project. The Department hereby assumes jurisdiction over said project

Further, it is hereby ORDERED that the City of Pleasantville turn over all plans, correspondence and other such documents pertinent to this project to the Department of Community Affairs

Any questions regarding this ORDER shall be directed to the below listed individual:

John F Dotoli
Office of Regulatory Affairs
Post Office Box 818
Trenton, New Jersey 08625-0818
Phone (609) 984-7672

Joseph V Doria, Jr.
Acting Commissioner

By

Louis J Mraw
Supervisor
Office of Regulatory Affairs